(17)

No. 95-719-CFX
Status: GRANTED

Title: William Gasperini, Petitioner
v.
Center for Humanities, Inc.

Docketed:
November 3, 1995

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Abady,Samuel A.

Counsel for respondent: Olson,Theodore B.

Entry	Date	Note	Proceedings and Orders
1	Nov 3 1995	G	Petition for writ of certiorari filed. (Response due December 3, 1995)
2	Dec 4 1995		Brief of respondent Center for Humanities, Inc. in opposition filed.
3	Dec 27 1995		DISTRIBUTED. January 12, 1996 (Page 3)
4	Dec 27 1995	X	Reply brief of petitioner filed.
6	Jan 16 1996		REDISTRIBUTED. January 19, 1996 (Page 13)
7	Jan 19 1996		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
8	Jan 19 1996	X	Supplemental brief of petitioner filed.
9	Feb 16 1996		SET FOR ARGUMENT TUESDAY, APRIL 16, 1996. (1ST CASE).
10	Mar 1 1996		Joint appendix filed.
		*	Joint appendix in two volumes
11	Mar 1 1996		Brief of petitioner William Gasperini filed.
12	Mar 1 1996		Brief amici curiae of Federal Jurisdiction and Legal History Scholars, et al. filed.
13	Mar 1 1996		Brief amicus curiae of Picture Agency Council of America, Inc. filed.
14	Mar 1 1996	G	Motion of Association of Trial Lawyers of America for leave to file a brief as amicus curiae filed.
15	Mar 8 1996		CIRCULATED.
16	Mar 20 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Second Circuit (BOX).
17	Mar 25 1996		Motion of Association of Trial Lawyers of America for leave to file a brief as amicus curiae GRANTED.
19	Mar 28 1996	X	Brief amici curiae of American Council of Life Insurance, et al. filed.
18	Mar 29 1996	X	Brief of respondent The Center for Humanities, Inc. filed.
20	Mar 29 1996	X	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
21	Mar 29 1996	X	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
23	Mar 29 1996	X	Brief amicus curiae of City of New York filed.
22	Apr 2 1996		Record filed.
		*	Miscellaneous plaintiff's exhibits including mounted

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No. 95-719-CFX

Entry	Date	Note	Proceedings and Orders
			pictures and three-part videotape submitted by petitioner.
24	Apr 9 1996	X	Reply brief of petitioner filed.
25	Apr 16 1996		ARGUED.

No. 95-____ Supreme Court, U.S.
FILED

95-719 NOV 3 - 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with this Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)?

2. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with the holdings of other circuits?

3. Does the Seventh Amendment permit a federal appellate court to overturn a jury award as excessive, particularly where the trial judge considered and rejected a post trial claim of excessiveness under Fed. R. Civ. P. 59?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated and entered on September 12, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is scheduled to be published at ___ F.3d ___ (1995), and is unofficially reported at 1995 WL 540410 (2d. Cir. (N.Y.)), and at 1995 U.S. App. LEXIS 25860. The decision is reprinted in full in the Appendix hereto at 1a-10a. The district court judgment and post-trial order appealed from were issued without opinion and are unpublished. They are reprinted in the Appendix hereto at 13a-14a.

JURISDICTION

The final decision of the Second Circuit overturning the jury verdict and conditionally ordering the remittitur was entered on September 12, 1995. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

A. Introduction.

A leading commentator has observed:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial.

11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2818 at 194 (2d ed. 1995).

As an increasing number of federal appellate courts overturn jury verdicts as excessive, *see* Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 238, 313, the Second Circuit's decision in this case provides a stark example of the threat posed to the Seventh Amendment when a federal court of appeals departs from clear Supreme Court precedent and substitutes its judgment for that of the jury.

In a startling decision, the Second Circuit abandoned what it acknowledged was "the traditional [federal] standard" for reviewing jury verdicts for excessiveness and applied a far more invasive state standard "which accords less deference to the jury's award than does the traditional standard," *solely* because the appeal arose in a diversity action. 8a. Thus, the Second Circuit declared: "This being a diversity case, we are *bound* to follow the standard set forth in the New York statute."[1]

Even though it found there were no trial errors, and rejected the argument that the jury acted out of any passion or prejudice, the Second Circuit nonetheless overturned the jury's award of damages. In so doing, the court conducted a *de novo* review of the facts and issued a conditional remittitur of the jury's award, based on the New York standard that mandates the Appellate Division review questions of fact to determine whether the verdict represented "reasonable compensation." 8a (citing N.Y. Civ. Prac. L & R. § 5501(c) (McKinney 1995)).

The Second Circuit's application of the state standard of appellate review to review the jury award for excessiveness violates this Court's clear holdings in prior cases. For this reason alone, certiorari should issue to resolve the Second Circuit's conflict with this Court's precedent.

In addition, the decision below is a further, dramatic example of the confusion and conflict that has developed among the federal circuits regarding the appropriate standard of appellate review to be applied in diversity actions when reviewing jury awards for excessiveness.

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[1] The Second Circuit declared it was "bound" by its own precedent decided a month earlier in *Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781 (2d. Cir. 1995), despite the fact that Consorti applied the state standard *ipsi dixit*, and without providing any rationale for rejecting the federal standard.

Hence, this case provides an important opportunity for this Court to resolve these conflicts, establish clear federal standards once and for all, and preserve the Seventh Amendment's guarantee of the right to a jury trial.

B. Factual Background And Trial Proceedings.

Noted CBS News correspondent William Gasperini commenced this diversity action in the United States District Court for the Southern District of New York against the Center For Humanities, Inc. (the "Center"), because the Center lost 310 of Gasperini's original and irreplaceable slide transparencies.

Shortly after trial began, the district judge granted Gasperini's *ore tenus* motion for a directed verdict on the issue of liability. Hence, the only issue that went to the jury was an assessment of damages. After a three-day trial on damages, with factual and expert testimony from eight witnesses, and significant documentary evidence,[2] the jury returned a verdict of $450,000 for Gasperini. *See* 11a.

The testimony supporting Gasperini's case was largely uncontroverted. The evidence established that his photographs were of the highest quality in the industry. The jury was shown that the lost transparencies represented Gasperini's life work on Central America created over a seven-year period, under conditions impossible to recreate (including the repeated risk of serious injury or death in war zones and travel to remote jungle and mountain regions).

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[2] Jurors were shown, *inter alia*, a video produced by the Center containing reproductions of over 100 of Gasperini's lost transparencies, and were provided with a meticulous description -- in writing, and augmented by Gasperini's testimony -- of the content of each of the 310 lost photographs and the circumstances under which each was taken.

Finally, expert testimony established that Gasperini's photographs would have had a recurrent value over the remaining 94 years of his copyright, that the market value for a one-time use of a single, original transparency could be as high as $30,000, and that the average value of Gasperini's photographs was $1,500 each.

After verdict, the Center moved for a new trial pursuant to Fed. R. Civ. P. 59(a), arguing that the trial judge erred in admitting certain evidence, and independently, that the jury's award was excessive. After extensive briefing, the Hon. Charles L. Brieant, who presided over the case from its inception, denied the motion. 11a-12a.

C. The Second Circuit's Decision.

The Second Circuit found no error at trial, expressly rejecting the Center's argument that evidence was admitted erroneously. 4a-5a. Nor did the Second Circuit find that the jury's verdict was influenced by passion or prejudice, or that there was any other defect in the trial proceedings.

Nonetheless, the Second Circuit overturned the jury's verdict as excessive, and ordered a new trial unless Gasperini would remit all but $100,000 in damages. 2a, 10a.

The Second Circuit's decision was remarkable because it held that, in a diversity action, not only did state substantive law apply, but further, that state law governed the appellate standard for reviewing the jury's verdict. 8a. Under the New York standard, the Appellate Division -- which is empowered to make *de novo* findings of fact -- "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *cited in* 8a. The Second Circuit conceded that "[t]his standard accords less deference to the jury's award than does the traditional [federal] standard, under which the jury's

award is overturned only if it is so excessive as to shock the conscience of the court." 8a.[3]

Thus, apparently viewing itself as unbound by the Seventh Amendment or the federal standard, the Second Circuit proceeded to a *de novo* review of the "reasonable[ness]" of the jury's award under New York State law. Without citing any support in the record, the Court of Appeals "found" that the majority of the lost transparencies were worth no more than $100 each, and thus dramatically reduced the original jury award. 9a.[4]

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[3] On two occasions prior to its decision here, the Second Circuit expressly avoided determining whether the state standard, enacted in 1986, should be applied in federal court, explaining that its decision would be the same under either standard of review, i.e., that the jury award "shocked the conscience" of that court, and therefore, did not constitute "reasonable compensation." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189-90 (2d Cir. 1992); *Gardner v. Federated Department Stores, Inc.*, 907 F.2d 1348, 1353 n.1 (2d Cir. 1990). In contrast, the Second Circuit clearly implied in this case that application of the federal standard would have resulted in a different outcome because the court specifically noted that the state standard "accords less deference to the jury's award than does the traditional [federal] standard," and then proceeded to apply the state standard, rather than the federal standard. (8a)

[4] The Second Circuit did not explain, nor did the record support, its determination of which photos were worth $100 and which photos were worth more. In fact, the $100 figure, which was the Second Circuit's valuation for 250 of the 310 transparencies, appears nowhere in the record.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD FOR APPELLATE REVIEW OF A FEDERAL JURY VERDICT CONFLICTS DIRECTLY WITH THE DECISIONS OF THIS COURT.

The Second Circuit's decision below conflicts directly with this Court's pronouncement in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In *Browning-Ferris*, this Court considered the interplay of state and federal law in appellate review of jury verdicts for excessiveness:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our *only* inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . . *Federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. . . .*

492 U.S. at 278-79. (citations and footnotes omitted) (emphasis supplied).[5] *See also Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977) ("[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts *is . . . a matter of federal law*") (emphasis supplied).

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[5] Because the Court upheld the jury verdict in *Browning-Ferris*, it declined to reach the question of whether the Seventh Amendment allowed appellate review of jury verdicts at all. *Id.* at 279 n.25. *See infra* at 11-14.

In direct conflict with *Browning-Ferris*, however, the Second Circuit held that, in a diversity action, state and not federal law governs appellate review of a federal jury award for excessiveness. 8a.

The importance of the Second Circuit's conflict with this Court in *Browning-Ferris* cannot be overstated. Federal courts, including those exercising diversity jurisdiction, are bound by the constraints of the Seventh Amendment. *Browning-Ferris*, 492 U.S. at 280 n.26 ("federal courts operate under the strictures of the Seventh Amendment"); *see also A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 359-60 (1962). Conversely, the state courts are not bound by the Seventh Amendment. *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Thus, the states are free to adopt highly intrusive standards for appellate review of jury verdicts, unrestricted by Seventh Amendment concerns. As a result, importing state standards into diversity cases completely eviscerates Seventh Amendment protections.

Yet, that is precisely what occurred in this case. The state standard adopted by the Second Circuit mandates that "[t]he appellate division shall review questions of law and questions of fact . . . [and] "*shall* determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995) (emphasis supplied), *quoted in* 8a.[6] According to the Second Circuit, this standard requires appellate courts to "exercise closer control over jury awards," *Consorti*, 64 F.3d at 790, and therefore, is far more intrusive than the federal standard.

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[6] CPLR § 5501 sets forth the standard of review for all the New York appellate courts. Whereas CPLR § 5501(c) mandates the Appellate Division to make *de novo* findings of fact, in contrast, CPLR § 5501(b) provides: "The court of appeals shall review questions of law only, except that it shall review questions of fact where the appellate division . . . has expressly or impliedly found new facts . . . ."

See David Siegel, Practice Commentary, N.Y. Civ. Prac. L. & R. § 5501, at 24 (McKinney 1995). It is therefore clear that application of the New York standard by a federal appellate court violates the Seventh Amendment.

As Chief Justice Rehnquist noted:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

This Court should grant certiorari to resolve the significant conflict between the decision below and this Court's decisions preserving the Seventh Amendment right to a jury trial. *See* Sup. Ct. R. 10.1(c); *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974) (granting certiorari "[b]ecause of the novel nature of the Seventh Amendment question"); *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (granting certiorari "because of the importance of preserving for litigants . . . their right to a jury trial").

II. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD OF APPELLATE REVIEW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit's holding is in direct, active conflict with recent holdings of other circuits. The Court of Appeals for the First, Fourth and Seventh Circuits have expressly held that, in diversity actions, the federal and not state standard applies to the appellate review of jury awards claimed to be excessive. *Laubach v. Khajawai*, No. 94-2421, 1995 WL 508879, at **2 (4th Cir. Aug. 29, 1995) (refusing to apply state standard for reviewing excessiveness, "the granting or denial of a new trial in a diversity action is a matter of procedure governed by federal law and not by state substantive law."); *Mayer v. Gary Partners and Co.*, 29 F.3d 330, 334-35 (7th Cir. 1994) (federal not state law applies to review of all issues concerning sufficiency of the evidence including verdicts that are allegedly excessive); *Lakin v. Daniel Marr & Son*, 732 F.2d 233, 235 (1st Cir. 1984) ("we measure the excessiveness of a jury award not . . . according to the state's standard of review, but according to that ordinarily applied in the federal courts").[7]

The Second Circuit's decision in this case also directly conflicts with the practice -- if not explicit holdings -- of the Third and Tenth Circuits. *E.g., Peco Energy Co. v. Boden*, 64 F.3d 852, 859 (3d Cir. 1995) (applying federal "shocks the conscience" standard for reviewing claims of excessiveness in diversity actions); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1169-71 (10th Cir. 1981) (same).

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[7] The Sixth Circuit may also be in conflict with the decision below. *See Blasky v. Wheatley Trucking, Inc.*, 482 F.2d 497, 498 (6th Cir. 1973) (state law is not controlling on whether to grant or deny new trial on the ground of excessiveness, as this issue is within discretion of the district court).

While the Second Circuit is alone in its complete departure from the once axiomatic proposition that federal law governs appellate review of jury verdicts in diversity cases, the Fifth, Eighth and Eleventh Circuits pay lip service to the standard mandated by this Court, while continuing to apply the state standard. In practice, these circuits, like the Second Circuit, wrongly apply state law when determining the scope and standard of review of jury verdicts based on a claim of excessiveness. *Petrowski v. Southworth Products*, 15 F.3d 748, 753-54 (8th Cir. 1994) (applying state standard of appellate review); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir. 1991) (while "federal law applies to our review of the decision to order a new trial as the result of an excessive verdict, . . .[w]e look to [the less deferential, state statutory standard of appellate review] to determine whether the verdict is excessive"); *In re Air Crash Disaster Near New Orleans, La.*, 764 F.2d 1084, 1090 (5th Cir. 1985) (while federal law determines procedural question of new trial, "we may not affirm an award which could not be affirmed by the highest court of the state whose law we are applying").

Recent decisions by the Seventh and Eighth Circuits illustrate sharply the doctrinal split among the circuits.

The Eighth Circuit recently re-affirmed that court's long standing adherence to the application of state law standards of appellate review when considering the excessiveness of jury verdicts in diversity cases. *Petrowski*, 15 F.3d at 753-54. *See also Vanskike v. Union Pacific Railroad*, 725 F.2d 1146, 1150-51 (8th Cir. 1984) ("this court is aware of its duty to refer to the law of the forum state when determining the inadequacy or excessiveness of a jury verdict") (citing *Hysell v. Iowa Public Service Co.* 559 F.2d 468, 472 (8th Cir. 1977)).

In contrast, the Seventh Circuit has consistently applied federal standards of review to appeals alleging excessive jury verdicts. *Roggow v. Mineral Processing*, 894 F.2d 246, 249 (7th Cir. 1990); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 970-71 (7th Cir. 1973). And, while the Seventh Circuit has never deviated from this position, it had been inconsistent, until

recently, on the broader issue of whether state or federal standards should apply to other aspects of the interaction between judge and jury. To correct this, the Seventh Circuit in *Mayer* relied on this Court's pronouncements in *Browning-Ferris* and *Donovan* and ended many years of confusion by adopting a uniform rule of applying federal standards of review to jury verdicts in diversity cases. Under its new uniform rule, federal and not state standards of review apply whenever either the trial judge or the appellate court considers a motion for a new trial on *any* basis. 29 F.3d at 334-35. Thus, the Seventh Circuit strongly stated its position that federal law must be applied by a federal court exercising diversity jurisdiction when reviewing jury verdicts claimed to be excessive.

Because the irreconcilable split among the circuits threatens the role of the jury as guaranteed by the Seventh Amendment, *see* Point I, *supra*; Point III, *infra*, this Court should grant certiorari to resolve this conflict and set a clear standard. *See* Sup. Ct. R. 10.1(a) & (c).

III. THE SECOND CIRCUIT'S DECISION RAISES THE IMPORTANT, UNDECIDED QUESTION OF WHETHER THE SEVENTH AMENDMENT PERMITS AN APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS.

Three times in the past, most recently in 1989, this Court granted certiorari to determine whether the Seventh Amendment permits appellate review of a district court's denial of a Rule 59 motion to set aside a jury award as excessive. In each case, this Court upheld the jury's verdict, and thus found it unnecessary to reach the question. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n.25 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). This Court should now settle this important federal question raised by the Second Circuit's decision below. *See* Sup. Ct. R. 10.1(c).

In preserving the right to trial by jury, the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. In a case such as this, where there is no finding of trial error of any kind, appellate review of a jury's verdict for excessiveness could be warranted under the Seventh Amendment only if appellate courts exercised such authority at common law.

However, "[e]veryone concedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2819 at 203 (2d ed. 1995) ("Wright, Miller & Kane"). Thus, as this leading commentator has concluded, "[t]o allow appellate review of the denial of the new-trial motion . . . would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." *Id.* at 204.

Indeed, this Court, in a case decided much closer to when the Seventh Amendment was enacted, held it

> is a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.

United States v. Laub, 37 U.S. (12 Pet.) 1, 5 (1838).

Indeed, as recently as 1940, this Court stated categorically: "[c]ertainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) (circuit court of appeals

without power to review federal trial court's grant or denial of new trial based on a claim of excessiveness); *Southern Ry. -- Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914); *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 574 (1887).

Nonetheless, despite the absence of any change in the law, in the last fifty years, every federal circuit has arrogated to itself the power to review and reverse a trial court's denial of a motion for a new trial solely on the ground that the verdict is excessive. *See* Wright, Miller & Kane § 2820 at 209 & n.10. The federal circuits are exercising this newly asserted power in an increasingly aggressive fashion. *See* Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 238, 248, 313 ("Schnapper") (study finds appellate courts overturned 50% of all appeals in which the jury verdict was claimed to be excessive).

Because the federal circuits have asserted their authority to review jury verdicts for excessiveness in the absence of any pronouncement from this Court, they are operating without ascertainable standards. This Court has never given explicit approval to any standard of review. Wright, Miller & Kane § 2820 at 212. And while all federal circuits have purportedly adopted standards requiring a strong showing before the verdict will be reversed, *see id.* at 212-14 & nn. 24-25 (citing cases), there is no uniformity among the circuits, and no clear articulation of what these inherently elastic standards mean. *See Grunenthal*, 393 U.S. at 159 n.4.

For example, many courts articulate the standard of review as an "abuse of discretion" where the losing party made a Rule 59 motion. *Id.* at 212-13 & n. 24 (citing cases). But a 1984-1985 study of appellate decisions found that,

> out of sixty-eight appeals involving a challenge to the size of a verdict, the original "abuse of discretion" standard was applied in only seven cases. Among the thirty-four cases overturning a verdict as excessive, there is not

> a single instance in which a panel purporting to apply an abuse of discretion standard actually found that such an abuse had occurred.

Schnapper, 1989 Wis. L. Rev. at 320 (footnotes omitted). In other words, many federal courts of appeals have assumed the power to review jury verdicts *de novo*.

A number of circuits use a different standard, holding that a jury verdict will be overturned when it represents a "monstrous or shocking injustice," *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994) or is "grossly excessive, clearly not supported by the evidence, or based only on speculation or guesswork," *Boem v. American Broadcasting Co., Inc.*, 929 F.2d 482, 488 (9th Cir. 1991) or constitutes a "grave abuse of discretion." *Baker v. Dillon*, 389 F.2d 57 (4th Cir. 1968) *See also* Wright, Miller & Kane § 2820 at 213-14 & n.25 (citing cases). As Schnapper observes:

> It would be a rather considerable exaggeration to characterize these formulations as legal standards. None of the appellate decisions provide any guidance for distinguishing a "shockingly" high verdict from one that is merely "stunningly," "surprisingly," or "very" high. One Fifth Circuit decision acknowledged that an appellate decision applying this formulation could not "be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation."

Schnapper, 1989 Wis. L. Rev. at 322-23 (quoting *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156 (5th Cir. 1985)).

The Second Circuit's decision in this case highlights these common problems facing the federal appellate courts. For example, notwithstanding this Court's pronouncement in *Browning-Ferris*, the Second Circuit did not even mention, much less follow, an abuse of discretion standard regarding the Center's claim that the trial judge abused his discretion in denying the Rule 59(a) motion.

Likewise, while the Second Circuit stated that its "traditional standard" is to reverse jury verdicts for excessiveness only where they "shock the conscience of the court," (8a), it implicitly limited that standard to federal question cases and adopted the state standard solely for diversity cases. 8a. Thus, the court applied the far more invasive state standard which *requires* the appellate division of the New York state courts to reverse a jury verdict whenever it "deviates materially" from "reasonable compensation." *Id.* By adopting the state standard, the Second Circuit placed itself in the role of a thirteenth juror -- with veto power.

CONCLUSION

The decision below calls out for this Court's intervention. This Court should grant certiorari to determine whether and to what extent federal appellate courts may review jury verdicts for excessiveness, consistent with the mandate of the Seventh Amendment.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND ENTERED SEPTEMBER 12, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1133 -- August Term, 1994

(Argued: March 8, 1995 Decided: September 12, 1995)

Docket No. 94-7823

WILLIAM GASPERINI,

Plaintiff - Appellee,

v.

THE CENTER FOR HUMANITIES, INC., doing business as Guidance Associates,

Defendant - Appellant.

B e f o r e: MAHONEY, WALKER, and CALABRESI,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), after a jury trial, awarding damages against defendant-appellant Center for Humanities, Inc., in the amount of

$450,000 for the loss of 300 slide transparencies belonging to plaintiff-appellee William Gasperini.

Reversed and remanded for a new trial on the issue of damages unless Gasperini agrees to remit all damages in excess of $100,000.

Francis A. Montbach, New York, NY (Bingham Englar Jones & Houston, New York, NY, on the brief), *for Appellant Center for Humanities, Inc.*

Samuel A. Abady, New York, NY (Jonathan S. Abady, David N. Mair, Rubin, Kalnick, Bailin, Ortoli & Abady, P.C., New York, NY, on the brief), *for Appellee William Gasperini.*

CALABRESI, *Circuit Judge*:

Although we usually think of photography as creating a permanent record, its permanence is tenuous at best. This is particularly so in the case of slide transparencies, the medium in which most professional photographers work. Duplication of the original transparency is difficult and necessarily involves a significant loss of quality. As a result, commercially viable prints can in most cases only be made from the original transparency. And once an original slide transparency is lost, the ability to make commercially usable prints is also lost, leaving behind only those prints that had already been made. This reality lends a certain urgency to transactions involving the use of original transparencies.

In this case, plaintiff-appellee William Gasperini, a journalist, provided some three hundred slides to the defendant-appellant Center for the Humanities ("the Center"), slides which the Center

subsequently lost. The Center conceded liability for the lost transparencies, and a jury trial on the issue of damages was held before the United States District Court for the Southern District of New York (Brieant, *J.*). The jury returned an award of damages for Gasperini in the amount of $450,000. Because we conclude that this award is excessive under New York law (the applicable law in this diversity case), a new trial will be required unless Gasperini agrees to a remittitur and accepts an award of $100,000.

I. BACKGROUND

William Gasperini is a well-regarded journalist for CBS News and the Christian Science Monitor. Since he began his journalism career in 1984 in Central America, Gasperini has earned his living primarily in the radio and print media, although, on occasion, he has also sold photographs. Gasperini's earnings from photography, by his estimation, total just over $10,000 for the period from 1984 through 1993.

In 1990, Gasperini entered into a contract with the Center, under which Gasperini agreed to supply the Center with original color transparencies that he took in Central America between 1984 and 1990. Gasperini delivered 300 transparencies to the Center; he claimed that his mother produced an additional ten transparencies at a later date. The Center used the transparencies in the preparation of an educational videotape titled *Conflict in Central America*. Gasperini was to be paid a royalty of fifteen percent of the cash receipts from the sale of the videotape. It was understood that the Center would return the original transparencies to Gasperini when work on the videotape was completed. But when the time came, and despite an extensive search, the Center could not locate the transparencies.

Gasperini brought this diversity action in the District Court for the Southern District of New York. The Center admitted liability, and the issue of damages was tried to a jury in June 1994. At the trial, Gasperini presented evidence, largely through expert witness Jane Kinne, that an "industry standard" within the

photographic publishing community valued lost transparencies at $1,500 each. Following a three-day trial, the jury returned a verdict awarding Gasperini damages of $450,000, which, according to the jury foreman, represented $1,500 each for 300 transparencies. The Center moved for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. The district court denied the motion without comment, and this appeal followed.

II. DISCUSSION

Because the jury returned a damage award equal to the so-called industry standard of $1,500 per lost transparency, the Center focuses its argument on the propriety of allowing the jury to hear evidence about that standard. According to the Center, in the absence of an explicit agreement to pay the so-called industry standard as liquidated damages in the event transparencies are lost, no industry standard exists under New York law. Because there was no liquidated damages agreement in this case, the Center contends that it was error to deny the Center's motion *in limine* and to allow the jury to hear evidence about an industry standard.

The Center is correct that the Appellate Division of the New York Supreme Court has on two occasions refused to recognize an industry standard as, by itself, determinative of value. *See Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 571-72, 592 N.Y.S.2d 27, 28 (lst Dep't), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S.2d 581 (1993); *Alen MacWeeney, Inc. v. Esquire Assocs.*, 176 A.D.2d 217, 218, 574 N.Y.S.2d 340, 341 (lst Dep't 1991), *leave to appeal dismissed*, 79 N.Y.2d 1015, 584 N.Y.S.2d 437 (1992). But the Appellate Division has not unequivocally rejected the relevance of evidence of an industry standard when such evidence is combined with other proofs. Rather, the court has concluded: "This record, as well as case law, makes it clear that no such standard exists, without,*inter alia*, a consideration of the uniqueness of the subject matter of the slides and the earning level of the photographer." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341; *see also Nierenberg*, 189 A.D.2d at 572, 592

N.Y.S.2d at 28 (quoting *MacWeeney*). From the references to the "record" in these decisions, it is apparent that the New York courts view the existence of an industry standard as, at least in part, a question of fact, subject to proof at trial. Accordingly, the district court did not err in allowing the jury to hear evidence about an industry standard.

That said, the jury's award cannot stand. As we have noted, New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer. *Blackman v. Michael Friedman Pub. Group, Inc.*, 201 A.D.2d 328, 328, 607 N.Y.S.2d 43, 44 (lst Dep't 1994); *Nierenberg*, 189 A.D.2d at 572, 592 N.Y.S.2d at 28; *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. And Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict.

Without question, some of the transparencies were unique: as Gasperini described them, they depicted combat situations in which Gasperini was the only photographer present. But Gasperini also testified that on numerous occasions other able, professional photographers were present, sometimes in large numbers, when he took photographs that were among the three hundred lost. Although we accept the proposition that each photographer brings his or her own skills, judgment, and perspective to a particular scene, leading to some variation between photographs of a single event, no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original.

Gasperini's earning record as a photographer further undercuts the jury verdict. The only evidence presented on this point was that the commercial use of Gasperini's photographs yielded income of slightly more than $10,000 over the ten year period from 1984 through 1993; in no year did he earn more than $3,720.40. For all his skills as a photographer, Gasperini did not earn his living with his camera, and there was no evidence presented that he would do so in the future. Gasperini did testify

that he had intended to produce a book about his experiences in Central America, a project that he claims is now doomed to failure by the loss of the three hundred transparencies. But there was no evidence presented that Gasperini had found, or would have been able to find, a publisher for such a work, much less that the volume would have earned him significant income.

Given the New York requirement that we consider the uniqueness of the lost transparencies and the earning level of the photographer, rather than relying solely on the so-called industry standard, the testimony of Jane Kinne, Gasperini's expert on the valuation of photographs, is of little utility. Ms. Kinne did testify that, in her opinion, the lost transparencies should be valued at $1,500 each. Her explanation for this valuation, however, said a lot about the alleged industry standard and virtually nothing about either uniqueness or earning level. Ms. Kinne explained the value she gave to the transparencies as follows: a transparency taken by a professional photographer and selected in a professional edit is, under the industry standard, worth $1,500; Gasperini is a professional photographer whose work has been professionally edited; therefore, the value of each of the lost transparencies is $1,500. Thus, under Ms. Kinne's approach, a common photograph of the President exiting a helicopter (culled from a number of such shots), taken by an inexperienced but published photojournalist, would have the same value as a classic image taken by a photographer with the reputation of Walker Evans or Alfred Eisenstaedt. New York law does not countenance such a methodology.

The object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket. In light of Gasperini's failure to make an effective showing that all 300 lost transparencies were unique, and the strong evidence of Gasperini's limited earning power as a photographer, the jury's award of $450,000 cannot be regarded as anything but a financial windfall for Gasperini.

A review of New York cases involving lost transparencies further supports the conclusion that the jury's award in this case

was excessive. *See Consorti v. Armstrong World Indus.*, No. 94-7501, slip op. at 6713 (when New York substantive law governs a diversity case, we look to New York decisions for guidance on the issue of excessiveness of damages). We acknowledge the limited utility of comparing damage awards in different cases, particularly since we find ourselves without access to the full records in the prior cases. *See id.* at 6716. Nevertheless, there is a clear pattern in appellate decisions addressing awards of damages for lost transparencies, and that pattern is instructive.

The Appellate Division has considered such damage awards on four occasions in the last six years. Only once did the court permit an award of $1,500 per lost transparency. *Girard Studio Group, Ltd. v. Young & Rubicam, Inc.*, 147 A.D.2d 357, 357, 536 N.Y.S.2d 790, 790 (1st Dep't 1989). In *Girard*, the court made no reference to the purported industry standard, but instead valued transparencies that "represented classics from a long career." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. In each of the other three cases, the Appellate Division reduced the award of damages to well under $1,500 per transparency. In *Nierenberg v. Wursteria, Inc.*, the court noted that, while there was evidence of the lost transparencies' uniqueness, that evidence was offset by the fact that the plaintiff earned little from still photography. It therefore rejected the application of the purported industry standard and reduced the damage award to $500 per transparency. 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. In *Blackman v. Michael Friedman Publishing Group*, where the record contained evidence of the photographer's earning power but no evidence of uniqueness, the court reduced a damage award from $1,000 per transparency to $400 per transparency. 201 A.D.2d at 328, 607 N.Y.S.2d at 44. And in *Alen MacWeeney, Inc. v. Esquire Associates*, despite evidence that the plaintiff was a successful photographer who earned $265,000 in the year of the loss, the court reduced a damage award from the claimed industry standard of $1,500 per transparency to less than $159 per transparency -- a total of $30,000 for 189 transparencies -- because of the generic nature of the transparencies' subject matter. 176 A.D.2d at 218, 574 N.Y.S.2d at 341.

Gasperini cites a number of unpublished New York trial court awards applying the claimed industry standard of $1,500 per lost transparency. But these cases are inapposite for three reasons. First, our role in a diversity case in which the state's highest court has not spoken on an issue is to attempt to discern how that court would decide the issue. *See O'Neill v. City of Auburn*, 23 F.3d 685, 689-90 (2d Cir. 1994); *Plummer v. Lederle Lab.*, 819 F.2d 349, 355 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987). And we believe that published decisions of the Appellate Division are generally far better predictors of how the New York Court of Appeals would decide a question of state law than even a fair number of unpublished proceedings in the trial courts. Second, several of the unpublished decisions that Gasperini cites predate the Appellate Division's decisions in *MacWeeney* and *Nierenberg*; to the extent that the opinions are in conflict, the Appellate Division of course controls. And finally, as the district court noted, the bulk of the unpublished decisions are in cases that involved provisions under which the defendants expressly agreed to pay $1,500 in liquidated damages for any lost transparency. No such provision exists in this case.

New York law provides that, in a case where a jury returns an itemized verdict, as the jury did in this case, the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). This standard accords less deference to the jury's award than does the traditional standard, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court. *Consorti*, slip op. at 6712-13, 6717; *see also Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989) (stating the traditional standard). This being a diversity case, we are bound to follow the standard set forth in the New York statute. *Consorti*, slip op. at 6713.

Applying this standard, we conclude that the jury's award of $450,000 to Gasperini materially deviates from what is reasonable compensation. As we have said, where there is some evidence of uniqueness but no evidence of significant earnings, the New York

courts have determined that damages above approximately $500 per lost transparency are excessive. *Nierenberg*, 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. And where evidence of substantial earnings is offset by the absence of evidence of uniqueness, the courts have reduced damages awards to between $159 and $400 per lost transparency. *Blackman*, 201 A.D.2d at 328, 607 N.Y.S.2d at 44; *MacWeeney*, 176 A.D.2d at 217-18, 574 N.Y.S.2d at 341. In this case, Gasperini presented plausible evidence that some of his photographs were highly unique. Giving Gasperini every benefit of the doubt, there may have been as many as fifty such slides. The remaining photographs, however, were not unique; rather, they depicted either generic scenes or events at which other professional photojournalists were present. And, although Gasperini is a respected journalist whose contacts in the news industry may boost his prospects as a photographer, he has no established record of significant earnings from the commercial use of his photographs.

Drawing all reasonable inferences in favor of Gasperini, we conclude that the jury could have awarded damages of up to $1,500 per transparency for the transparencies as to which there was plausible evidence of significant uniqueness. As to the remaining transparencies, however, in light of Gasperini's limited earnings and the lack of uniqueness, any damage award of more than $100 per transparency would be excessive. Accordingly, we conclude that any award totalling more than $100,000 would exceed reasonable compensation.

Remittitur always presents difficult problems for appellate courts. We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. This case is particularly difficult, since neither we nor the jury was able to see the lost transparencies themselves. In the end, it is not our job to impose a specific award of damages -- that task is for the jury. We do, however, have the obligation to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded. *See Vasbinder v. Scott*, 976 F.2d 118, 122 (2d Cir.

1992); *Phelan v. Local 305 of the United Ass'n of Journeymen, & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Can.*, 973 F.2d 1050, 1064 (2d Cir. 1992). Accordingly, we will set aside the jury's verdict of $450,000, and will order a new trial unless Gasperini acquiesces to an award of $100,000.

APPENDIX B -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JULY 29, 1995

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

William Gasperini,

Plaintiff,

-against-

The Center For Humanities, Inc., d/b/a Guidance Associates,

Defendant.

----------X

93 Civ. 7204 (CLB)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Francis A. Montbach, sworn to on the 11th day of July, 1994, the exhibits annexed thereto and the accompanying Memorandum of Law, defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, will move this Court, at the Courthouse, 101 East Post Road, White Plains, New York, Courtroom No. 31 for an Order pursuant to Rule 59 of the Federal Rules of Civil Procedure granting defendant a new trial, on the issue of damages, in the captioned matter, said motion to be heard on the 29th day of July, 1994, at 9:00 a.m. in the forenoon of that day.

In accordance with FRCP Rule 59(c), opposing affidavits, if any, must be served upon movant within ten (10) days of service hereof.

Dated: New York, New York.
July 11, 1994.

BINGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a Guidance Associates

By /s/ Francis A. Montbach
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JONATHAN S. ABADY, ESQ.
Attorney for Plaintiff
251 West 91st Street
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New York, New York 10028

Motion Denied

SO ORDERED

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED JUL 29, 1994

July 29, 1994

/s/ Charles Brieant
U.S.D.J.

ENTERED: August 4, 1994

APPENDIX C -- JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JUNE 30, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

William Gasperini,	:	93 CIVIL 7204 (CLB)
Plaintiff,	:	JUDGMENT
-against-	:	U.S. DISTRICT COURT
The Center For Humanities, Inc., d/b/a Guidance Associates,	:	S.D. OF N.Y. FILED JUN 30, 1994
Defendant.	:	

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant, United States District Judge with a jury on June 6, 1994, and at the conclusion of the trial, the jury having returned a verdict in favor of the plaintiff in the amount of $450,000.00 and the court thereafter directed the clerk to enter judgment in favor of the plaintiff with pre-judgment interest at the rate of 9% per annum from August 30, 1991, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff William Gasperini have judgment in the sum of $564,750.00, as against the defendant.

DATED: White Plains, N.Y.
June 30, 1994

APPROVED:

/s/ Charles Brieant
U.S.D.J.

/s/ James M. Parkison
Clerk

ENTERED: July 1, 1994

APPENDIX D -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JUNE 27, 1995

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

William Gasperini,

Plaintiff,

-against-

The Center For Humanities, Inc., d/b/a Guidance Associates,

Defendant.
----------X

93 Civ. 7204 (CLB)

MOTION IN LIMINE

S I R S :

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BINGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, While Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the prevailing decisional law establishing that no such "industry standard" exists and that to permit the jury

in this action to hear comment or testimony as to its existence would be prejudicial to the defendant herein.

Dated: New York, New York.
June 23, 1994.

BIGHAM ENGLAR JONES &
HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a
Guidance Associates

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Attorney for Plaintiff
251 West 91st Street
Suite 2C
New York, New York 10028

Motion Denied. See transcript of trial for oral decision.

SO ORDERED

June 27, 1994

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED JUN 27, 1994

/s/ Charles Brieant
U.S.D.J.

ENTERED: June 27, 1994

No. 95-719

Supreme Court, U.S.
FILED
DEC 4
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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16pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Center for Humanities, Inc., certifies that the following are its corporate parent, subsidiaries and/or affiliates:

Guidance Associates
Science & Mankind
Parents Magazine Films
Pathescope Educational Media
Vocational Media Associates
AutoVideo Productions

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-719

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

Respondent, The Center for Humanities, Inc., respectfully requests that this Court deny the Petition for a Writ of Certiorari herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is published at 66 F.3d 427 (2d. Cir. 1995).

FACTUAL STATEMENT OF THE CASE

(I) THE FACTS

Petitioner, William Gasperini, now a journalist for CBS Radio News (3a), started his journalism career in 1984 as a free-lance print and radio journalist in Central America (3a). While there he took photographs, some of which he occasionally sold to the print media, earning, in the decade between 1984 and 1993, a total of approximately $10,000, an average of $1,000 per year, with almost 40% of those earnings coming in one year (5a). He admittedly did not earn his living with his camera (5a), and by his own testimony had no plans to market his photographs of Central America. His only other plans for these photographs was to use them in a book he intended to write about Central America, but the book has neither been written nor sold and the Circuit Court found no evidence that it was likely that such a book would generate significant income (6a).

Respondent is in the business of producing educational videos for school children (3a). In 1990, Respondent borrowed 300 of Mr. Gasperini's slides of Central America for use in an educational videotape. According to the contract between Petitioner and Respondent, the only compensation for the use of the slides was to be a royalty payment of fifteen percent of the cash receipts from the sale of the videotape (3a). Not only were these royalties paid, but an additional payment of $3,500.00 was made to Mr. Gasperini due to lower than expected sales of the videotapes. When the Center attempted to return the slides, they could not be found, despite an extensive search (3a).

The only contract between the Petitioner and Respondent was the royalty agreement and it did not contain any provision for liquidated damages should Petitioner's property be lost or damaged, nor did it make any reference to Petitioner's claimed industry valuation standard (3a, 4a).

II. THE PROCEEDINGS BELOW

Although Respondent generally agrees with the Petitioner's outline of the proceedings below, Petitioner's synopsis of the Second Circuit's conclusions warrants correction and clarification. The Second Circuit addressed only two of the points of error raised on appeal by Respondent and having found the jury award excessive, did not comment upon four other points of error. The Second Circuit did not comment upon: (1) whether the industry standard was relevant in the context of the contractual relationship between Petitioner and Respondent; (2) whether industry standard evidence should have been excluded as being likely to confuse the issues and mislead the jury; (3) whether Respondent's proposed jury instruction, advising the jury not to take the industry standard into consideration, should have been given; or (4) whether Respondent's right to cross-examine was improperly restricted. Petitioner's implication that these points of error were specifically rejected by the Second Circuit is erroneous.

ERRONEOUS COMMENTS IN PETITIONER'S BRIEF

At page 3 of his brief, Petitioner claims the Circuit Court "found that there were no trial errors, and rejected the argument that the jury acted out of any passion or prejudice, . . .". However, the only finding by the Circuit Court with regard to trial errors raised by Respondent was that the denial of Respondent's Motion *In Limine* was not in error and that the verdict was excessive (4a, 5a). Having found the jury's verdict unsupported by the evidence and manifestly excessive, the Circuit Court neither specifically ruled on nor rejected any of the other grounds for reversal raised by Respondent.

At page 4 of his brief, Petitioner stated: "The testimony supporting Gasperini's case was largely uncontroverted". To the contrary, although not reflected in the Circuit Court's opinion, the testimony at trial established that the missing 300 slides came from over 4,500 pictures taken by Petitioner in

Central America, and that duplicates of approximately 100 of the 300 missing slides were available. In addition, testimony submitted by Respondent provided the basis for the Circuit Court's finding that with the exception of 50 of the missing slides, the lost slides lacked uniqueness and "depicted either generic scenes or events at which other photographers were present" (9a).

At page 5 of his brief, Petitioner stated "expert testimony established that . . . the average value of Gasperini's photographs was $1,500 each". Not only did the Circuit Court find Petitioner's expert's method of valuation contrary to New York law and unsupported by the evidence (6a), Respondent presented expert valuation testimony of much lower value, testimony strikingly similar to the Circuit Court's evaluation and within the outer bounds of a reasonable award (9a).

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT THE JURY'S VERDICT WAS EXCESSIVE

In an effort to obtain review, Petitioner has mischaracterized the process used by the Second Circuit in finding that the jury's verdict was so excessive as to mandate a new trial. Contrary to Petitioner's assertions, the Second Circuit followed accepted procedures for review in diversity cases and found that the jury's verdict resulted in an award which "cannot be regarded as anything but a financial windfall for Gasperini" (6a). In effect, the Second Circuit viewed the jury award as being akin to "a winning lottery ticket" (6a).

The use of the terms winning lottery ticket and financial windfall clearly indicate that the Second Circuit was shocked by the size of the jury's verdict, especially in view of the lack of evidence sufficient to sustain it (5a). This is readily understandable when a jury awards four and a half times what the

Circuit Court found to be the "outer bounds" of reasonable compensation (9a).

In reaching its conclusion, the Second Circuit used the methodology accepted by Circuit Courts to determine whether a jury award should be overturned as excessive. It compared the verdict with other cases involving similar injuries in the state whose substantive law governs the rights of the parties. *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2nd Cir. 1984); *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 921 (5th Cir., 1987), cert. denied, sub. nom. *Rachelle Laboratories, Inc. v. Osburn*, 485 U.S. 1009, 108 S.Ct. 1476 (1988); *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 531 (8th Cir. 1984). Recognizing that the sky is not the limit for jury verdicts, even those that have been once reviewed, *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1141 (5th Cir. 1991), the Second Circuit looked at cases in the recent past in New York that have properly applied New York damages law in order to find the greatest amount that New York courts have awarded for similar injuries. *Id.* at 1141 (7a). Having done so, and having found a clear pattern in New York appellate decisions addressing award of damages for lost transparencies (7a), the Second Circuit found the award to Mr. Gasperini to be a financial windfall (6a), unsupportable by the evidence and excessive.

The Second Circuit followed accepted federal law in its analysis of the excessiveness issue. It reviewed relevant state case law on excessive awards, *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 816, 108 S.Ct. 70 (1987) and found the jury's award manifestly excessive. In so doing, it did not deviate from the basic tenets of Federal court appellate review of jury verdicts.

II. APPELLATE REVIEW OF JURY VERDICTS FOR EXCESSIVENESS IS PROPER AND NECESSARY

Petitioner correctly acknowledges that the Circuit Court of Appeals uniformly review jury verdicts for excessiveness and that this Court has not indicated that the Circuit Courts are acting without Constitutional authority. Petitioner, however, fails to accept the fact that appellate review of jury verdicts is not only proper, it is a necessity.

This Court, in *Honda Motor Co., Ltd. v. Oberg*, __ U.S. __, 114 S. Ct. 2331 (1994) recognized that modern practice in the Federal courts and virtually every state permits judges to review the size of damage awards, *Id.* at 2338, a practice which comports with common law precedent. Petitioner fails to note that such review is necessitated by the increasing proclivity of juries to award excessive damage amounts. Appellate review for excessiveness is needed in order to ensure that jury awards are "evenhanded, fair, and predictable". *Consorti v. Armstrong World Industries, Inc.*, 65 F.3d 781, (2nd. Cir. 1995) and do not impose unpredictable high costs on society. *Id.* at 787. Recognizing that the sky is not the limit for jury verdicts, *Seidman v. American Airlines, Inc.*, *supra* at 1141, Circuit Courts review jury verdicts to ensure that they are "within the universe of possible awards supported by the evidence", *Clark v. Taylor*, 710 F.2d 4, 13 (1st Cir., 1983) and are not "beyond the maximum damages that a jury reasonably could find to be compensatory for a party's loss", *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983).

The need for evenhanded, fair and predictable jury awards is particularly germane in a commercial context, such as here. Here, a valuation standard mandating that any award of damages be based upon specific criteria was ignored by the jury and a windfall award of $450,000 was given to a person with no demonstrated earning power from photography. The jury award was not evenhanded, fair or in accordance with the standard established by New York courts to ensure predictability. Nor was it within the universe of possible awards

supported by the evidence. The Second Circuit Court of Appeals recognized this and in keeping with their inherent powers and duties, held the unfounded award to be so excessive as to warrant vacating and ordered a new trial. Petitioner has not seriously disputed the Second Circuit's factual finding and has not provided a basis for overturning it. The Second Circuit's granting of a new trial preserves Petitioner's Seventh Amendment right to trial by jury. *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695, 704 (1st Cir. 1988).

III. JUSTICE WAS SERVED BY THE DECISION BELOW AND THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE ISSUES RAISED BY PETITIONER

Leaving aside the frightening contention that the Seventh Amendment bars any review of jury verdicts by appellate courts, if Petitioner has in fact identified an issue worthy of this Court's consideration, this is not the case in which to consider it. No matter how the standard of review of damages verdicts is articulated, or what body of law that standard is taken from, it is impossible to avoid the conclusion that there was something seriously wrong with the jury's verdict in this case. Thus, the issues raised by Petitioner amount to pure semantics.

Petitioner attempts to portray in stark terms the disparity between the New York State "deviates materially" standard of review and the "shock the conscience" standard followed by some federal courts and seeks to elevate that disparity to constitutional heights, pp. 8-9, but the entire exercise is long on rhetoric and short on reality. The differences between those standards simply don't exist in any practical sense, especially in a commercial case such as this. Even the lower federal courts have articulated the standard of review of damages awards in divergent ways, many of which resemble the New York standard. Indeed, there are almost as many statements of the federal standard of review as there are judicial circuits.

See Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corporation, 65 F.3d 1113, 1125 (4th Cir. 1995) (damages award cannot be set aside unless it is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice."); *Hogan v. Bangor and Aroostook R.R. Co.*, 61 F.3d 1034, 1037 (5th Cir. 1995) ("An award of compensatory damages is excessive if it exceeds a rational appraisal of the damages actually incurred."); *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 727 (7th Cir. 1995) (jury award can be disturbed only if it is "monstrously excessive, the product of passion or prejudice, or if there is no rational connection between the award and the evidence"); *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994) (amount of damages awarded by fact finder must stand unless there is an error of law or "the amount is clearly erroneous or so gross or inadequate as to be contrary to right reason."); *Meyers v. Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (damages award by trial court will not be overturned unless "it manifests plain injustice, or is so grossly excessive as to be clearly erroneous."); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 553 (1993) (award must stand unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand."); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580 (Fed. Cir. 1992) (jury's finding must be upheld unless amount is "grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.") (citing *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360 (9th Cir.), *cert. denied*, 484 U.S. 826 (1987)); *Neyer v. United States*, 845 F.2d 641, 645 (6th Cir. 1988) (a reduction in damages award may be justified even if it does not "shock the conscience, but rather leaves us with the definite and firm conviction that a mistake has been committed resulting in plain injustice."); *Cunningham v. Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986) (appellate court should review damages

award "when the amount creates plain injustice or a monstrous or shocking result.").

However, the diversity of opinion on how the standard of review should be translated into words is not a call to arms for this Court, because there is a common thread running through the phraseology used by all of the Court of the Appeals; they all strive to defer to the jury's subjective appraisals of value, while remaining vigilant to prevent injustice, by ensuring that verdicts find support in the evidence. No intervention by this Court is necessary to ensure this common endeavor.

The common endeavor is exactly what the Second Circuit pursued. The opinion below makes it quite evident that the panel was shocked to contemplate that a small business which accidently lost some slides could be flattened by a judgment of $450,000, plus interest, in favor of a news reporter who had no demonstrated plans for the slides and whose peak annual earnings from photography were less than $4,000. The Circuit Court repeatedly indicated that it found the verdict bereft of record support. For example it held:

> New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer. And Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict.

(5a) (citations omitted).

Perhaps the most critical point below was that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." (5a). It is obviously no mathematical coincidence that the verdict below is equal to the 300 lost slides multiplied by the $1,500 "industry standard" that the plaintiff repeated *ad nauseam* in front of the jury. There can be no doubt that the verdict was the product of

a jury that was less interested in reviewing the evidence than in quickly getting home.

Notwithstanding petitioner's implication to the contrary, the Circuit Court never suggested that it would reach a different result had it applied a "shock the conscience" standard. Indeed, when a jury ignores evidence (or lack thereof) as it did here, a court's conscience *should* be shocked.[1]

Thus, if this court has any desire to examine the issues raised by the Petitioner, Respondent respectfully submits that there are much better vehicles for considering them. Justice was served in this case when the Circuit Court rendered its opinion.

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[1] One reason why this can be more easily said here is that this is not a personal injury case. It is much harder for a court to justify the assertion that its conscience is shocked by a personal injury or wrongful death verdict, considering the subjective nature of the analysis. By contrast, the valuation of personal property is much more of an exercise in dry mathematics. In these circumstances, it is much easier to determine when the jury has ignored evidence and victimized a party, and thus much easier for an appellate court to find its conscience shocked by the verdict.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 95-719

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY TO OPPOSITION BRIEF

I. THE SECOND CIRCUIT'S DECISION RAISES COMPELLING QUESTIONS CONCERNING THE PROPER SCOPE OF FEDERAL APPELLATE REVIEW OF JURY AWARDS UNDER THE SEVENTH AMENDMENT.

Respondent concedes that a federal appellate court applying a *state* standard for reviewing a jury verdict for excessiveness in a diversity suit presents a compelling question of Seventh Amendment law appropriate for this Court's review. Brief in Opposition ("Opp. Cert.") at 7. To escape the conclusion that certiorari should be granted, however, respondent vainly argues that, notwithstanding the Second Circuit's actual holding, the court below actually *meant* to apply a federal standard in this case. *E.g.*, *id.* at 4-5, 9, 10. A plain reading of the Second Circuit's opinion refutes respondent's position and demonstrates that this compelling federal question is squarely presented in this case.

The importance of the Second Circuit's decision cannot be overstated. *See* Petition for a Writ of Certiorari ("Cert. Pet.") at 2-4, 8-9. The Second Circuit made a radical departure from the holdings of this Court and the other circuits by deciding that in a diversity action state, not federal, law governs appellate review of jury awards for excessiveness. 8a. But states are not bound by the Seventh Amendment, *Hardware Dealers Mutual Fire Insurance v. Glidden Co.*, 284 U.S. 151, 158 (1931), and are free to adopt any standard of appellate review of jury verdicts, however invasive. Thus, the net effect of the holding below is to render the Seventh Amendment inapplicable in diversity cases.

Respondent does not contest this, but would have this Court believe that the Second Circuit in effect applied a federal standard of review. Opp. Cert. at 4-5, 9-10. Respondent attempts to assure this Court that the difference between the federal and state standards "amount[s] to pure semantics." *Id.* at 7. These claims are directly controverted by the Second Circuit's holding, which expressly states:

> New York law provides that, in a case where a jury returns an itemized verdict, as the jury did in this case, the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). *This standard accords less deference to the jury's award than does the traditional standard*, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court. *Consorti*, slip op. at 6712-13, 6717; *see also Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989) (stating the traditional standard). *This being a diversity case, we are bound to follow the standard set forth in the New York statute*. *Consorti*, slip op. at 6713.

8a (emphasis supplied).

Thus, the Second Circuit plainly applied the state, not federal, standard of appellate review of the jury's verdict, *solely* because this is a diversity suit. Moreover, the court below specifically held that the two standards were materially different, with the state standard of review "accord[ing] less deference to the jury's award than . . . the traditional [federal] standard."[1] 8a. *See also Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, 790 (2d Cir. 1995) (state standard requires appellate courts to "exercise closer control over jury awards"). The difference between the federal and state standards is not mere "semantics". Opp. Cert. at 7. Under the federal standard, at least as traditionally applied by the Second Circuit, absent abuse

[1] One of the anomalies of the holding below is that it would appear to allow additur in a diversity suit, *see* 8a (appellate court "shall determine" whether "an award is . . . inadequate"), even though federal courts are prohibited from increasing a jury award, even where the inadequacy is shocking to the conscience. *See Dimick v. Schiedt*, 293 U.S. 474 (1935); *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1331 (2d Cir. 1990).

of discretion or trial error,[2] a trial court's denial of a motion to set aside a jury verdict would not be reversed, even if the appellate court would have awarded a lesser sum, and even if it would have set aside the verdict had it been the trial court. *Batchowsky v. Penn Cent. Co.*, 525 F.2d 1121, 1124 (2d Cir. 1975); *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797, 806 (2d Cir. 1961).

In contrast, under the New York state standard applied by the Second Circuit in this case, the appellate court is required to exercise *de novo* review of jury awards. *See* N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *quoted in* 8a; *see also* Cert. Pet. at 8-9 & n.6.

Here, an improper exercise of *de novo* review is precisely what the Second Circuit engaged in. Contrary to respondent's suggestion, this is not a case where the appellate court merely required that there be some "support in the evidence" for the jury's award. Opp. Cert. at 9. There can be no dispute that there was some evidence to support every aspect of the jury's award, including properly admitted expert testimony. *See* Cert. Pet. at 4-5. On appeal, however, the Second Circuit reviewed selected portions of the trial evidence, finding them to be unpersuasive. Indeed, respondent correctly refers repeatedly to the "findings" below, conceding that the Second Circuit was engaged in an improper, *de novo* factual review. *See, e.g.*, Opp. Cert. at 2 (appellate court "found" it unlikely that petitioner's book would generate significant income); *id.* at 4 (appellate court did not "find" petitioner's expert witness persuasive); *id.* at 7 (arguing that "[p]etitioner has not seriously disputed the Second Circuit's factual finding . . ."). Again, this impermissibly

[2] Respondent contends that the Second Circuit did not address four "trial errors" raised below. Opp. Cert. at 3. In fact, each alleged error merely reformulates respondent's basic argument that the trial court erroneously allowed the jury to hear evidence of an industry standard in assessing damages. The Second Circuit considered and rejected respondent's arguments. 4a-5a.

invasive factual review is precisely what the Second Circuit was compelled to perform, once it incorrectly held that it was "bound" by the *de novo* state standard. 8a.

Respondent assures this Court that there are no Seventh Amendment concerns presented by this case because the Second Circuit ordered a new trial. Opp. Cert. at 7. Respondent misapprehends the purpose and meaning of the Seventh Amendment. The Seventh Amendment not only provides "the right of trial by jury," U.S. Const. amend. VII, it also guarantees that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *Id.* Thus, the Seventh Amendment protects the sanctity of the jury's verdict from unwarranted judicial intrusion. Understanding that, this Court has never hesitated to intervene to protect a party's Seventh Amendment rights merely because a lower court afforded the "option" of a new trial. *See* cases cited in Point IV *infra*.

While attempting to discount the significance of the Second Circuit's abrogation of the Seventh Amendment, respondent concedes that the decision below reflects a widespread pattern in the lower federal appellate courts. As set forth in the petition, the decision below occurs in the context of increasingly aggressive federal appellate review of jury verdicts for excessiveness. Cert. Pet. at 2, 11-12. Quite frequently, appellate courts are simply exercising *de novo* review. Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts ("Schnapper")*, 1989 Wis. L. Rev. 237, 320. Respondent does not dispute this expanding trend to ever greater federal appellate review of jury awards, but argues that "such review is necessitated by the increasing proclivity of juries to award excessive damage amounts." Opp. Cert. at 6. Certainly, such an important question of federal law, national in scope and affecting an ever increasing number of litigants, is worthy of this Court's review.[3]

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[3] Respondent argues that this case involves only an "exercise in (continued...)

There is no dispute about the present confusion and disarray among the federal courts regarding the proper standard of appellate review. *See* Cert. Pet. at 15. "Indeed," as respondent states "there are almost as many statements of the federal standard of review as there are judicial circuits." Opp. Cert. at 7; *see also id.* at 8-9. This Court's intervention is therefore required to bring order to this chaotic state of law, and set forth clearly the proper federal standard for appellate review of jury awards.

II. RESPONDENT DOES NOT DISPUTE THAT THE DECISION BELOW DIRECTLY CONFLICTS WITH THE HOLDINGS OF THIS COURT.

The Second Circuit's decision in this case directly conflicts with this Court's holdings in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). *See* Cert. Pet. at 7-9. Respondent does not dispute this point. Indeed, respondent does not even mention *Browning-Ferris*, *Donovan*, or any other applicable decision of this Court. Thus, certiorari should be granted to review the square conflict between this Court's prior holdings and the decision below. Sup. Ct. R. 10.1(c).

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[3] (...continued)
dry mathematics," as opposed to "a personal injury case" where the exercise of appellate review is "much harder" because of "the subjective nature of the analysis." Opp. Cert. at 10 n.1. Respondent assures this Court that in such a context, the appellate courts "all strive to defer to the jury's subjective appraisals of value." *Id.* at 9.

This argument is wrong in both respects. First, assessing damages for a creative work of art is hardly an exercise in "dry mathematics." Second, the claim that appellate courts only aggressively review jury awards in "commercial" cases is inaccurate. In fact, "[t]he rate at which jury verdicts are overturned for excessiveness does not vary with the subject matter of the appeal." Schnapper, 1989 Wis. L. Rev. at 250.

III. THE DECISION BELOW PRESENTS A COMPELLING, ACTIVE AND LONG-STANDING CONFLICT AMONG THE CIRCUITS.

Just as respondent does not dispute the conflict between the Second Circuit's decision and this Court's holdings, it is uncontested that the decision below directly conflicts with the holdings of several other federal appellate courts. *See* Cert. Pet. at 10-12.[4]

Moreover, this conflict among the circuits is compelling, active and long-standing. Just two weeks before the Second Circuit's decision in this case, holding that a state standard applied in diversity suits, 8a, the Fourth Circuit reached the exact opposite holding. *See Laubach v. Khajawai*, No. 94-2421, 1995 WL 508879, at **2 (4th Cir. Aug. 29, 1995) ("the granting or denial of a new trial in a diversity action is a matter of procedure governed by federal law and not by state substantive law").

[4] The closest respondent comes to addressing this issue is to contend that the court below merely "compared the verdict with other cases involving similar injuries in the state whose substantive law governs the rights of the parties." Opp. Cert. at 5. While prior awards are not binding, an appellate court certainly may examine them to "guide" and "enlighten" the exercise of its review. *Martel v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir. 1984). But this is *not* the question presented by this petition, nor would mere reliance on prior state cases warrant overturning the jury verdict in this case. Indeed, the Second Circuit conceded that prior New York state appellate courts had upheld similar jury awards, as long as the transparencies were sufficiently unique. *See* 7a (citing *Girard Studio Group, Ltd. v. Young & Rubicam, Inc.*, 147 A.D.2d 357, 357, 536 N.Y.S.2d 790, 790 (1st Dep't 1989)). The issue presented here is not whether a court may look to prior cases, but whether a federal court sitting in diversity should apply a federal or state standard of appellate review.

Other decisions in the last few years similarly demonstrate that this conflict is on-going. *See, e.g., Peco Energy Co. v. Boden*, 64 F.3d 852, 859 (3d Cir. 1995); *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334-35 (7th Cir. 1994).

That the conflict has persisted for years, demonstrates that the federal circuits are not likely to resolve the issue among themselves. *Compare Lakin v. Daniel Marr & Son*, 732 F.2d 233, 235 (1st Cir. 1984) (in diversity action appellate court applies federal not state standard of review) *with In re Air Crash Disaster Near New Orleans*, 764 F.2d 1084, 1090 (5th Cir. 1985) ("in diversity case we may not affirm an award which could not be affirmed by the highest court of the state whose law we are applying").

Thus, certiorari should be granted to resolve this compelling, active and long-standing conflict among the circuits.

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE SEVENTH AMENDMENT PERMITS A FEDERAL APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS.

Respondent largely fails to address the third question presented for review, namely, whether the Seventh Amendment permits a federal appellate court to review a jury award for excessiveness, in the absence of any trial error.[5]

[5] Respondent argues that this Court implicitly approved of federal appellate review of damage awards in *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331, 2338. That case, however, does not address the issues raised by this petition. In *Honda* this Court ruled that a state court jury's award of punitive damages violated the due process clause of the Fourteenth Amendment. Because *Honda* was a state case, the Seventh Amendment did not apply.

There can be little doubt that this question is worthy of review, given that this Court has granted certiorari three times to address it. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n. 25 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). In the absence of any pronouncement from this Court, the state of law in the lower federal appellate courts has become increasingly confused. Cert. Pet. at 14-16.

Other than expressing its fear at the prospect of this Court's review, Opp. Cert. at 7, respondent's only mention of this issue is its entirely unsupported claim that appellate review of jury verdicts for excessiveness "comports with common law precedent." *Id.* at 6. In fact, as set forth in the petition, "[t]o allow appellate review of the denial of a new-trial motion . . . would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2819 at 204 (2d ed. 1995). *See* Cert Pet. at 12-14. Respondent simply has no answer to this argument.

This Court should therefore grant review to resolve this compelling, long-standing question of federal law.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 95-719

(4)

Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Sup. Ct. R. 15.8, petitioner submits this supplemental brief in support of his petition for a writ of certiorari, calling attention to a new case not available at the time of petitioner's reply brief.

In reaching its holding below to apply a *state*, not federal standard of appellate review of a jury award for excessiveness in a diversity action, the Second Circuit relied on its earlier decision in *Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, 789-90 (2d Cir. 1995). *See* 8a. Recently, the Second Circuit issued an amended *Consorti* opinion, setting out in detail the reasons for its holding. The amended opinion in *Consorti*, attached as an appendix to this supplemental brief, provides further support for granting the petition in this case, *see* 18sa-24sa.

In reaching its holding, the Second Circuit candidly acknowledged that several other circuits "continue[] to apply federal standards of excessiveness" in diversity suits. 21sa n.9. The Second Circuit specifically noted that its holding was in direct conflict with recent decisions by the Seventh, Fourth and Tenth Circuits. *Id.* (citing *Mayer v. Gary Partners & Co. Ltd.*, 29 F.2d 330, 334 (7th Cir. 1994); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809-10 (10th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *appeal dismissed per stipulation*, 935 F.2d 1105 (10th Cir. 1991)). *See also* 20sa n.8.

The Second Circuit's amended opinion in *Consorti* also implicitly acknowledged the tension between its holding and what the Second Circuit described as this Court's "extraordinarily broad statement" in *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) that "[t]he proper role of the trial and appellate

courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law . . . ." 19sa.[1]

Finally, the Second Circuit's amended opinion in *Consorti* makes clear that, contrary to respondent's argument, the difference between the federal and state standards of review in this case does not "amount to pure semantics." *See* Opp. Cert. at 7. In its amended opinion, the Second Circuit repeatedly noted that the "question has significance . . . because the New York rule . . . is less deferential to the jury's verdict than the federal standard . . . ." 18sa. Indeed, as the Second Circuit noted, the "[d]ecisions of New York State courts show that the two standards are different." 23sa n.10.

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[1] Apparently, the Second Circuit dismissed this Court's holding in *Donovan*, as well as the Second Circuit's own prior holdings, as "confusingly broad categorical statements." 19sa n.7.

The Second Circuit reasoned that this issue was "substantially clarified" by this Court's subsequent decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In *Browning-Ferris*, as the Second Circuit correctly noted, this Court held that in a diversity action state substantive law would determine the "propriety of an award of punitive damages". 21sa (citing *Browning-Ferris*, 492 U.S. at 278. However, while state substantive law certainly controls in a diversity suit whether a category of damages are available or how they are determined, *the standard of review* of a jury award is nonetheless governed by federal, not state law. As this Court stated, "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." *Id.* at 278-79. The Second Circuit's reading of *Browning-Ferris* confuses these two issues by applying a state standard of appellate review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition and in petitioner's reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AMENDED OPINION

No. 857—August Term, 1994

(Argued: November 14, 1994

Decided: August 28, 1995)

Amended: December 22, 1995)

Docket No. 94-7501

JOHN CONSORTI & FRANCES CONSORTI,

Plaintiffs-Appellees,

—v.—

ARMSTRONG WORLD INDUSTRIES, INC., formerly known as Armstrong Cork Co.; COMBUSTION ENGINEERING, INC., et al.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge,*
ALTIMARI and LEVAL, *Circuit Judges.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) after a jury trial, awarding damages against an asbestos manufacturer for injuries caused by mesothelioma, an asbestos-related form of cancer. Defendant-appellant claims error as to several aspects of the trial, primarily consolidation of the cases of several plaintiffs, excessiveness of the award to John Consorti for pain and suffering, a recommendation by counsel to the jury as to the award amount, and the award to the spouse for loss of consortium.

Reversed and remanded for a new trial on the issue of damages for pain and suffering unless plaintiffs agree to remit all damages in excess of $3.5 million. By previous order of this court, the determination of the spouse's consortium claim was certified to the New York State Court of Appeals, which ruled that no cause of action was provided under New York law. Accordingly, we vacate that portion of the judgment awarded for loss of consortium. Affirmed in all other respects.

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LEVAL, *Circuit Judge*:

Owens-Corning Fiberglas Corporation ("OCF"), a fabricator of asbestos pipe-covering products, appeals from jury verdicts in favor of John Consorti, a pipe insulation worker who developed mesothelioma as the result of exposure to asbestos dust, and his wife Frances for loss of consortium. The trial in the Southern District of New York before Robert W. Sweet, *Judge*, which consumed 25 trial days, consolidated the claims of four plaintiff couples against numerous manufacturers of asbestos products. The jury rendered verdicts for the plaintiffs totalling in excess of $47 million. OCF's main claims on appeal are: (1) that the four cases should not have been consolidated; (2) that the $12 million award for John Consorti's pain and suffering was excessive; and (3) that Frances Consorti had no claim under New York law for loss of consortium because John's noxious exposure occurred prior to their marriage. OCF also challenges the sufficiency of evidence on various points, and numerous rulings made at trial.

We certified the question of Mrs. Consorti's entitlement to sue for loss of consortium to the New York Court of Appeals. *Consorti v. Owens Corning Fiberglas Corp.*, 45 F.3d 48, 49 (2d Cir. 1995). On October 24, 1995, the Court of Appeals ruled that the facts proved do not give rise to a cause of action for loss of consortium under New York law. *Consorti v. Owens-Corning Fiberglas Corp.*, 1995 WL 619791 (N.Y. Oct. 24, 1995). Accordingly, we vacate the award for loss of consortium. We affirm on all other issues except the size of John Consorti's award for pain and suffering, which we believe was beyond what New York law permits.

BACKGROUND

A detailed account of the case is set forth in the district court's opinion in *In re New York Asbestos Litig.*, 847 F. Supp. 1086 (S.D.N.Y. 1994) ("*Consorti et al.*"). We include here only the facts necessary for the discussion below.

John Consorti ("Consorti") was a 40% owner of Veteran Pipe Covering, a family insulator business. He worked for Veteran as a pipe covering insulator from 1960 to 1963, and from 1970 to 1978. From 1963 to 1970, he worked as an insulator for another family business, State Pipe Covering. In 1978, he became Vice-President of Veteran, a position in which he remained until 1992. While working at these businesses, and at least through the mid-1970s, Consorti was exposed to asbestos products, including OCF's product.

Consorti began to suffer back problems in August 1991. In February 1992, he was diagnosed with pleural mesothelioma, an incurable cancer of the lining of the lung. He died after trial, at the age of 51, in November 1993.

Consorti initiated his asbestos personal injury action in August 1992 against numerous defendants in the Southern District of New York. His suit was one of the many thousands of asbestos cases reassigned by the Multi-District Litigation Panel to the Eastern District of Pennsylvania for discovery and pre-trial proceedings. Because of his rapidly advancing illness, his case was deemed an emergency "hardship" and was remanded to the Southern District of New York for expedited trial. It was consolidated for trial in 1993 with three other cases of mesothelioma due to asbestos exposure. *In re New York Asbestos Litig.*, 145 F.R.D. 644 (S.D.N.Y. 1993) ("*New York Asbestos I*"); *In re New York Asbestos Litig.*, 149 F.R.D. 490 (S.D.N.Y. 1993) ("*New York Asbestos II*"). OCF was a defendant only in the Consorti action.

OCF moved to sever the Consortis' case from the other plaintiffs, and the court denied the motion. *New York Asbestos II*, 149 F.R.D. at 491.

The trial of the consolidated action began on June 21, 1993. At trial, Consorti proved that his incurable fatal disease was caused by his ingestion and respiration of asbestos fibers. He demonstrated that he had endured enormous suffering from the mesothelioma and was likely to die within a few more months.

On July 22, 1993, after a five-week trial, the jury returned its first special verdict, awarding another plaintiff, Vincent Tabolt, over $13 million in damages, including $7.5 million for approximately 18 months of pain and suffering. After the jury announced the award, Judge Sweet, seeking to encourage the panel after its long days of hard work, said:

> You are probably the best jury that has ever been put together in the United States of America. You paid very close attention, you worked very hard. . . . Thank you very much for the good work you have done.

Outside the presence of the jury, OCF objected to the court's praise of the jury, arguing that the judge's remarks would be taken as approval of the enormous verdict and would influence the verdicts yet to be rendered. The following day, the court denied a motion for a mistrial, but gave a curative instruction:

> I wanted to be clear that since you have entered a verdict in one case that I was referring, of course, not to the verdict in any way, about which I have no control, that is entirely in your hands, but, rather, in the way in which you conducted yourselves . . . . It's the way in which you have conducted yourself, not the verdict itself.

The jury then deliberated on the Consorti case. In summation, plaintiffs' counsel had suggested awards of $8 million for John Consorti's past pain and suffering, plus $4 million for his future suffering. The jury returned a verdict that awarded exactly those amounts. The jury found John's remaining life expectancy to be nine months. OCF was found 7% responsible for Consorti's injuries.

OCF moved for judgment as a matter of law, a new trial, or a remittitur, all of which were denied. However, the court did conclude that the jury's calculation of Frances Consorti's future non-economic loss was against the weight of the evidence and must be set aside. *Consorti et al.*, 847 F. Supp. at 1105. In lieu of a new trial, the parties stipulated to an award for non-economic consortium of $332,000. The district court also reduced the verdict on economic damages for Frances's loss of future consortium to $750,000. *Id.* at 1106.

After judgment molding, the district court entered judgment against OCF for more than $11.5 million. *Id.* at 1086. This appeal followed.

DISCUSSION

OCF appeals numerous aspects of the case below and asks that the judgment be set aside or that remittitur be ordered.

A. *Consolidation*

Relying on a flawed understanding of our holding in *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), OCF contends that Judge Sweet erred in consolidating the cases of several plaintiffs into a single trial. OCF treats *Malcolm* as establishing a strong anti-consolidation bias. We take pains to emphasize that we have made no such suggestion. The reversal in *Malcolm* was attributable to factors unique to that case. We stressed that "[w]e do not wish to be understood as condemning all consolidations of asbestos cases." 995 F.2d at 354. In fact, after observing that the federal courts were "swamped with asbestos suits," 995 F.2d at 348, and that the " 'heyday of individual adjudication of asbestos mass tort lawsuits has long passed,' " *id.* (quoting *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991)), we indicated that another consolidation of a substantially larger number of asbestos cases coming from the Brooklyn Navy Yard (which were not appealed on that ground) would have passed muster. 995 F.2d at 353.

Consolidation is a valuable and important tool of judicial administration. This is especially true when the courts are overwhelmed with huge numbers of cases which involve substantially the same questions of fact, as happens when large numbers of plaintiffs allege that they have developed similar illnesses in reaction to a particular toxic substance. *See* Fed. R. Civ. P. 42(a). In

such circumstances, consolidation permits the federal court to furnish trials in hundreds, even thousands of cases it might otherwise not reach for many years. If carefully and properly administered, as it was by Judge Sweet below, consolidation is also capable of producing, with efficiency and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice.

We noted in *Malcolm* that at that time more than 200,000 asbestos cases had been filed in state and federal courts, with as many as 250,000 additional cases expected to come. 995 F.2d at 348. It requires little imagination to recognize that without consolidation the courts are simply incapable of handling litigation of such volume. The waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering. This is all the more true when one recognizes that each successive jury must be educated by expert witnesses to understand the toxicity of asbestos fibers, the etiology of asbestos-induced diseases, the state of the art regarding the industry's knowledge of these dangers through the years, and the economic issues involving loss of services and future income that recur so frequently in these cases.

Needless to say, efficiency cannot be permitted to prevail at the expense of justice. *Id.* at 350. The obligation of the courts to deliver justice is paramount, and it may not be scrapped for the benefit of cheaper and more rapid dispositions. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990). On the other hand, the judiciary, like every other institution, must be open to discarding habits that have outlived their usefulness, and must bend under the pressures of modern life to find greater efficiency in accomplish-

ing its mission. When enormous savings of expense and gains of efficiency can be accomplished *without sacrifice of justice*, courts must be ready to alter their procedures. *See* American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* 16-18 (1994).

This is all the more true when increases in efficiency also *improve* the quality of the justice rendered. When cases are properly chosen for consolidation and well administered, this will be the case. One of the most persistent and troublesome problems in the administration of justice in our civil jury system is the unpredictable relationship between different juries' awards, particularly for intangibles such as pain and suffering. It of course should be the goal of the overall administration of such litigation that more seriously injured plaintiffs receive higher compensation than those less seriously injured. However, when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance. *See generally* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale J. on Reg. 171, 177 (1991). When numerous claims are tried before a single jury, that jury will recognize that an important part of its chore is to scale the relative seriousness of the various plaintiffs' injuries and to see to it that their respective awards are consistent with that scaling.

Different juries also can produce inconsistent verdicts on liability and the extent of responsibility. This may be encouraged by counsel's litigation strategy. When only a small segment of a much larger picture is before the jury, counsel can present a deceptive view of the relative

responsibility of various actors—especially entities that are absent from the trial. This becomes far more difficult when the jury is considering a broader spectrum of information and more of the relevant actors are present defending their positions. *See* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 15 (1986) ("Beyond the sheer economy of not having to litigate the same matters twice, consolidation . . . can reduce such problems as inconsistent outcomes, whipsawing (from the ability of defendants in separate litigations to point to a nonparty as the one truly liable), and uncoordinated scrambles for the assets of a limited fund.") (footnotes omitted).

Furthermore, no logic supports the proposition that the incremental addition of similar cases will reduce the jury's ability to understand and resolve the issues placed before it. Without doubt, consideration of a single toxic tort case is challenging, requiring jurors to grapple with complicated issues of chemistry and medicine. But it does not follow that the jury will be less able to deal with those issues if the same questions are repeatedly put to it over a substantially longer period of time. Quite to the contrary, if a jury spends many weeks, or many months, considering numerous cases of asbestos disease, and repetitively hears the disputes of experts and the arguments of counsel on case after case, that jury is likely to develop a far deeper understanding of the issues than a jury whose exposure to those complicated questions is brief, and requires answering only a single set of questions.

Malcolm suggests nothing to the contrary. The majority in *Malcolm*, over Judge Walker's dissent, found various case-specific problems that led it to the conclusion

that justice had been sacrificed. A principal problem identified in *Malcolm* was that the very basis of consolidation was found to be inapplicable to the case. The consolidation was premised on the supposed fact that each plaintiff had spent more than 50% of his work history at one or more of 40-odd power plant construction sites in New York State. *Malcolm*, 995 F.2d at 351. At trial, however, it emerged that several plaintiffs had spent only small fractions of their exposure history at power plant sites, and the jury in fact had before it evidence of over 250 work sites with varying product mixes. *Id.* Another problem was that 13 days before trial, over 200 companies had been impleaded as third-party defendants, and some of them in turn impleaded fourth-party defendants. *Id.* at 348. The court expressly queried whether these late-added parties had adequate opportunity to prepare for trial. *Id.* at 352. The most critical problem undermining the *Malcolm* consolidated verdict was the majority's perception that, instead of apportioning responsibility on the basis of the evidence, the jury had simply "throw[n] up its hands," *id.*, and apportioned "an equal 9% liability to each defendant," *id.*, in spite of the fact that "the evidence regarding [plaintiffs'] exposure to [the defendant's] products was vague, minimal, and heavily circumstantial when compared to the extensive evidence regarding the products of [another defendant] . . . ." *Id.*

OCF argues that some of the factors we listed in *Johnson*, 899 F.2d at 1285, and *Malcolm*, 995 F.2d at 350-51, as helpful in analyzing the propriety of consolidation, weigh against consolidation here. Prior to trial, Judge Sweet entertained a reconsideration of consolidation in light of our newly-issued *Malcolm* decision. He reviewed those factors carefully and adhered to his deci-

sion that consolidation was proper. *New York Asbestos II*, 149 F.R.D. at 499. It is important to remember that factors noted by a court as helpful in analyzing a particular question are no more than that; they are not a substitute for answering the question itself. When the issue for an appellate court is whether the trial court's decision to consolidate exceeded its discretion, the question remains whether the consolidation caused such confusion or prejudice as to render the jury incapable of finding the facts on the basis of the evidence. It is clear the consolidation here had no such consequence.

Furthermore, we have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. *See, e.g., Johnson*, 899 F.2d at 1285; *Malcolm*, 995 F.2d at 349, 352-53. Such management devices include organizing evidence by topic, using charts and visual aids, allowing note-taking by jurors, furnishing the jury with notebooks and albums of pertinent exhibits structured in a manner to help it master complex materials, interim explanations by the judge on issues of law and fact and on the limited use of evidence, interim addresses to the jury by counsel,[1] and questionnaires and special verdict forms to help the jury approach deliberations in a well-organized fashion.

Judge Sweet took numerous such steps to help the jury segregate the issues before it and distinguish among the four sets of plaintiffs and the various defendants. The jury was provided specialized notebooks with a photograph of each plaintiff, accompanied by undisputed biographical information. Jurors were encouraged to take extensive notes during trial. During opening statements

[1] *See* Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, Litigation, Fall 1985, at 7, 66.

and summations, counsel used charts to help the jury distinguish among the plaintiffs' exposure histories, together with time lines to help the jury differentiate between relevant periods in the state of the art. Counsel also provided citations to the trial record to help guide the jury to arguments regarding specific evidence. *Consorti, et al.*, 847 F. Supp. at 1093. Throughout the trial, Judge Sweet gave numerous cautionary and limiting instructions to assist the jury in its understanding of the bearing of the evidence on the various cases. The verdict forms which Judge Sweet prepared guided the jury step by step through the various issues it needed to consider and resolve. The jury was encouraged to consider each case separately.

By implementing such measures, Judge Sweet insured that plaintiffs and defendants received a trial by jury that fairly addressed the individual claims while effectively managing the resources of the court and giving the parties the benefit of an efficient and economical trial. We have no reason to believe that the consolidation prevented the jury from rendering verdicts based on the evidence as it related to each independent claim. OCF's contention of improper consolidation is without merit.

B. *Excessiveness of Award for Pain and Suffering*

OCF claims that the award to John Consorti of $12 million for his pain and suffering was excessive and should be set aside. We agree.

1. *The Role of Judge and Jury*

We note at the start, our finding in no way deprecates the enormous suffering that John Consorti endured. He developed a tumor which gradually enveloped his spine. The tumor pressed against his vocal cords, causing him

to lose his voice and choke. It interfered with eating, swallowing, even breathing. His circulatory system was impaired, causing painful and disfiguring swelling of his head and neck. And, as his disease progressed, it became increasingly difficult (later impossible) for him to walk or to care for himself. His pain grew worse as time passed, and was, of course, deepened by the certainty of imminent death. We take it as a given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.

It does not follow that courts should permit a verdict of a hundred million dollars, or twelve million, to stand. While the law seeks by reasonable compensation to make a plaintiff whole, we must recognize that compensation for suffering can be accomplished only in a symbolic and arbitrary fashion. There are at least two serious shortcomings to the endeavor. First, money awards do not make one whole; they do not alleviate pain. Second, there is no rational scale that justifies the award of any particular amount, as opposed to some very different amount, in compensation for a particular quantum of pain. *See Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979) ("measuring pain and suffering in dollars is inescapably subjective"); 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 201-02 (1991).[2]

We acknowledge furthermore that a judge's training in law gives the judge no greater ability than a jury to

[2] Juries may be especially inclined to make substantial awards when they believe that the defendant's liability is covered by insurance. While insurance frequently does cover the liability, jurors may neglect to consider the broader effect of their award on insurance premiums. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 591 (5th ed. 1984).

determine the dollar amount that appropriately compensates any particular level of suffering. *See* 2 American Law Institute, *supra*, at 202. This recognition can lead judges to abdicate responsibility for review of jury verdicts. As we have no greater knowledge than jurors of the amount of money that suitably compensates for suffering, the question arises why our assessment should take precedence over theirs?

Nonetheless, there are important reasons why courts cannot properly leave it to juries to set the limits of compensation for such injuries. Even where the law is incapable of furnishing a rational answer, it seeks at least to be evenhanded, fair, and predictable. It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation, *see Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases), and that similarly situated defendants be burdened by similar judgments. If each jury is given unbridled authority to set the level of damages, awards will vary widely and unpredictably. Great discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation. This vigilance must be directed not only against awards that are too high, but also against those that are too low. *See, e.g., In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853-54 (2d Cir. 1992) (ordering new trial on issue of pain and suffering where award of $25,000 was so low, given evidence of lengthy and intense suffering, as to shock the conscience). Such goals cannot be achieved unless courts exercise responsibility to keep jury awards within limits. *Cf. Restatement (Second) of Torts* § 901 (1977) (note) (describing rules for determining damage

awards); Fowler V. Harper et al., *The Law of Torts* 250-51 (2d ed. 1985) (describing judge's role in fashioning tort damages).

The unpredictability of jury awards is pernicious not only because it is unfair. Widely varying jury verdicts make it difficult for risk bearers to structure their behavior to efficiently manage risk. While it is an aim of tort law to deter wrongful conduct, *see Restatement (Second) of Torts* § 901 (1977), at the same time tort law seeks to avoid over-deterrence that would stifle socially valuable enterprise.

> Where liability costs are relatively predictable, they can be avoided (where it is efficient to do so) or 'built in' to the costs of goods and services. . . . But errors in valuation may cause over-deterrence—the taking of too many costly precautions, or withdrawal from risky activity altogether. For example, during the liability insurance crisis of the 1980s, many obstetricians reportedly stopped delivering babies, and some manufacturers ceased development or production of certain drugs and goods.

Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 925 (1989) (citations omitted). *See also* Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 289 (1987) (arguing that "individual juries acting in isolated tort cases . . . seem especially prone to overdeter some risky activities," thereby "discourag[ing] the taking of risks from which society might well benefit"); Peter H. Schuck, Introduction to *Tort Law and the Public Interest* 31-36 (Peter H. Schuck ed. 1991) (describing empirical research); 2 American Law Institute, *supra*, at 202-03; Oscar G. Chase, *Helping Jurors*

Determine Pain and Suffering Awards, 23 Hofstra L. Rev. 763, 769 (1995). When courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one.[3] Unbridled, spiraling, excessive judgments predictably impose huge costs on society.

A failure by courts to impose limits on jury verdicts would cause serious social dislocation. At the first level, unchecked costs attributable to tort liability, and resultant increases in insurance premiums, would inevitably raise the price of goods and services to the public. More serious exaggeration in unchecked jury awards can cause bankruptcies in productive enterprises, with consequent disappearance of jobs, and even bankruptcies among insurers, leaving segments of society unprotected. Finally, in the circumstance represented by asbestos litigation, where it appears virtually certain that the resources of major defendants will eventually be completely consumed by their liabilities, allowing excessive awards to stand in the early stages of the litigation of the many thousands of cases they face will mean that overcompensation of the early plaintiffs will leave insufficient resources for the equally deserving plaintiffs whose cases are heard later.[4]

For all these reasons, even if courts have no better ability than jurors to measure the dollar value of pain,

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[3] See discussion below at n.13.

[4] For example, Keene Corporation informed the trial court that it had already spent over $430 million to resolve 95,000 claims, with 98,000 others still pending; it had no further insurance coverage, and would "run out of funds long before all of the present claimants have been even partially compensated." Keene advised the court, "[T]here is no hope that those who filed late claims or who file claims in the future will receive any compensation." *New York Asbestos II*, 149 F.R.D. at 499-500.

they must accept the responsibility of controlling the limits of jury awards. *See generally* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256 (1989) (advocating increased judicial supervision of jury awards for pain and suffering prior to death).[5]

2. *The Award for Consorti's Pain and Suffering*

The first step in deciding whether the award of $12 million for John Consorti's pain and suffering is excessive must be to ascertain whether federal or state rules apply. The question has significance in this case because the New York rule, discussed below, is less deferential to the jury's verdict than the federal standard of whether the award was so excessive as to shock the conscience of the court. *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 & n.7 (2d Cir. 1993); *see, e.g., Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir. 1988) (applying federal standard in FELA case). We held in *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984), that in a federal court diversity suit state law governs the issue of excessiveness of a jury verdict on a motion for remittitur. Plaintiffs contend that decision was inconsistent with the Supreme Court's ruling in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). Accordingly, we review the question.

Since the landmark decision of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been a hallmark of federalism that a federal court sitting in diversity, while using its own rules to govern procedural matters, will

[5] We note that in the punitive damages context, the Supreme Court has held the availability of judicial review over jury awards to be constitutionally required. *See Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2340-41 (1994).

apply the substantive law of the forum state. The application of this standard to questions of remittitur has caused considerable confusion. *See In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1155 & n.4 (5th Cir. 1985) (noting "apparent conflict in the cases concerning whether the excessiveness of a verdict is a matter governed by state or federal law"); 19A Charles A. Wright et al., *Federal Practice and Procedure* § 4511 n.23 (1982 & Supp. 1995).[6] This is perhaps because courts have not always recognized that a question of remittitur arising in a particular case can involve either procedural or substantive issues, or both.

The Supreme Court's decision in *Donovan* involved a procedural question—whether a plaintiff who has accepted a district court's offer of remittitur may nonetheless appeal its determination that the jury's verdict was excessive. The Supreme Court unsurprisingly ruled that such a question arising in a case heard in the federal diversity jurisdiction would be governed by federal law. In delivering its ruling, however, the Court made an extraordinarily broad statement that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law . . . ." *Donovan*, 429 U.S. at 649.[7] Citing this language, plaintiffs contend that all remittitur questions are to be governed by federal rules. We do not agree.

[6] Our court has twice found it unnecessary to resolve this question in the context of the New York remittitur statute. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992); *Gardner v. Federated Dep't Stores, Inc.*, 907 F.2d 1348, 1353 n.1 (2d Cir. 1990).

[7] This court, too, has made confusingly broad categorical statements on this subject in the past. *See West v. Jutras*, 456 F.2d 1222, 1225 n.6 (2d Cir. 1972); *Karlson v. 305 East 43rd Street Corp.*, 370 F.2d 467, 472 n.1 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967).

The question we face is how much money John Consorti may be awarded in damages by reason of his pain and suffering. This is an issue of substantive rights under the laws of New York. If, for example, New York's statutes provided that no compensation was to be awarded for nonpecuniary loss, or scheduled the awardable amounts in the manner of workers' compensation statutes—*i.e.*, $X for injury to an arm, $Y for injury to a leg, $Z maximum for pain and suffering—federal courts ruling in diversity would unquestionably be bound by those substantive rules. *See Blaskey v. Wheatley Trucking, Inc.*, 482 F.2d 497, 498-99 (6th Cir. 1973) (Ohio statute prohibiting award of nonpecuniary damages is controlling substantive state law). And if a jury's award exceeded those standards, the federal court would be required to reduce the verdict to bring it into compliance with the substantive law of New York. Here, New York law provides that a jury verdict may not exceed that amount which would "deviate[ ] materially from . . . reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). This is the substantive rule provided by New York law. To disregard New York law in this case, in favor of the federal "shocks the conscience" standard, would violate the fundamental constitutional doctrine of *Erie*, 304 U.S. at 78.[8]

[8] We recognize that, in cases where state and federal substantive standards differ, some courts have chosen to follow federal law. *See, e.g., Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 410 (8th Cir. 1976). For the reasons stated in the text, we decline to follow this approach. No doubt it will sometimes be difficult to distinguish between procedural and substantive remittitur rules. Consider, for example, *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986), which applied federal remittitur rules in a diversity case where the forum state had abolished remittitur. It is difficult in the case of a state law doing away with remittitur to determine whether the rule is procedural or substantive. Such a rule presents itself as a procedural bar, but it has significant substantive ramifications. In contrast, New York's "deviates materially" standard is quite clearly a substantive rule governing the allowable size of jury verdicts.

This is substantially clarified by a more recent decision of the Supreme Court. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), involved a claim that a federal district court sitting in diversity had improperly failed to limit the size of a punitive damages award through remittitur. In that case, the Court reaffirmed the importance of applying federal procedural standards, but then made clear that "the propriety of an award of punitive damages . . . [is a] question[ ] of state law." *Id.* at 278. The Court expressly refused to "craft some common-law standard of excessiveness" since "these are matters of state, and not federal, common law." *Id.* at 279. As here, "[a]dopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues." *Id.* Hence, the *Browning-Ferris* Court approved the district court judge's application of "the proper state-law standard in considering whether the verdict returned was excessive." *Id.* at 280.

For purposes of deciding whether state or federal law is applicable, the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law. *Browning-Ferris* made clear that the excessiveness of punitive damages is governed by state, and not federal, law. The state's rule must also determine the excessiveness of compensatory damages.[9] Accordingly, we

[9] We note that, notwithstanding *Browning-Ferris*, a few courts have continued to apply federal standards of excessiveness in reviewing punitive damages. *See Mayer v. Gary Partners & Co. Ltd.*, 29 F.3d 330, 334 (7th Cir. 1994); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809-10 (10th

decided in *Martell*, 748 F.2d at 750, that, when conducting remittitur review as a court sitting in diversity, we would seek the governing standard in state court decisions. We therefore reject the plaintiffs' argument and look to the law of New York to determine whether the award was excessive. Like a New York court, we will "look . . . to other jury awards condoned by the courts of" New York, recognizing that "New York appellate courts regard prior awards as not binding but instructive. *E.g.*, *Senko v. Fonda*, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851 (2d Dep't 1976) (prior awards 'may guide and enlighten the court[s]' 'in the exercise of their discretion.')." *Martell*, 748 F.2d at 750.

The standard for determining excessiveness and the appropriateness of remittitur in New York is somewhat ambiguous. Prior to 1986, New York law employed the same standard as the federal courts, *see Matthews v. CTI Container Transport Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989), which authorized remittitur only if the jury's verdict was so excessive that it "shocked the conscience of the court." *See, e.g.*, *Neal v. Rainbow House Fruits*, 447 N.Y.S.2d 487, 488 (App. Div. 1982); *Juiditta v. Bethlehem Steel Corp.*, 428 N.Y.S.2d 535, 543 (App. Div. 1980); *Petosa v. City of New York, Dep't of Sanitation*, 406 N.Y.S.2d 354, 355 (App. Div. 1978). In 1986, New York State legislated a new standard that required the Appellate Division of the Supreme Court to exercise

Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *appeal dismissed per stipulation*, 935 F.2d 1105 (10th Cir. 1991). Some have avoided the issue by referring to both standards. *See Latham v. Nickerson American Plant Breeders*, 978 F.2d 1493, 1499 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3037 (1993). Other courts have applied state standards of excessiveness. *See Hiltgen v. Sumrall*, 47 F.3d 695, 704 (5th Cir. 1995); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991). We do likewise.

closer control over jury awards. The new CPLR § 5501(c) provides,

> In reviewing a money judgment in an action in which an itemized verdict is required . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate *if it deviates materially from what would be reasonable compensation*.

N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995) (emphasis added). This standard requires the reviewing court to determine the range it regards as reasonable, and to determine whether the particular jury award deviates materially from that range, taking corrective action if it does. Material deviation from reasonableness is less than that deviation required to find an award so excessive as to "shock the conscience."[10]

Because this statute makes explicit mention only of the Appellate Division, courts have expressed some confusion as to whether its standard applies also at the trial level. *See, e.g.*, *In re Joint E. & S. Dists. Asbestos Litig.*, 798 F. Supp. 925, 936-37 (E. & S.D.N.Y. 1992) ("*McPadden et al.*"), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds sub nom. Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). *See also* David D. Siegal, *Supplementary Practice Com-*

[10] Decisions of New York State courts show that the two standards are different. *See Harvey v. Mazal Amer. Partners*, 581 N.Y.S.2d 639, 643 (1992) (remanding to Appellate Division for reconsideration of remittitur using proper "deviates materially" standard, where Appellate Division had referred to both standards); *Shurgan v. Tedesco*, 578 N.Y.S.2d 658, 659 (App. Div. 1992) (affirming trial court's additur where court set aside jury award as materially deviating from what would be reasonable compensation).

mentary, C5501:10, *reprinted in* McKinney's Consolidated Laws of New York Annotated, Vol. 7B at 5 (1995 Supp.). We need not resolve whether the "deviates materially" standard applies to trial courts as well as to the Appellate Division. Unquestionably, it provides the standard for appellate review and must therefore be applied by this court, regardless whether it also governed the district court sitting as a New York trial court.

Because the standard of excessiveness is furnished by state law, the best guide for a federal court, if available, would be decisions of the state's courts in comparable cases indicating at what point awards become excessive. *See Martell*, 748 F.2d at 750. Although a number of pertinent New York State judgments on damages for pain caused by mesothelioma were available, the district court relied instead on *McPadden*, a recent *federal* trial court decision. *Consorti et al.*, 847 F. Supp. at 1096-97. In *McPadden*, the district court upheld a jury award of $4.5 million for pain and suffering due to mesothelioma. *McPadden et al.*, 798 F. Supp. at 937-38.

In discussing below the question of excessiveness of the jury's award to Tabolt of $7.5 million for pain and suffering, Judge Sweet converted the $4.5 million *McPadden* award to a monthly figure of $409,090.91 for McPadden's 11 months of suffering. Multiplication of that figure by Tabolt's 18 months of suffering produced a figure of $7,363,636.36, which was not substantially lower than the jury's award to Tabolt. *Consorti et al.*, 847 F. Supp. at 1097. Although it was not expressly discussed, the district court presumably used the same conversion of the *McPadden* award to a monthly amount to justify the jury's $12 million award to Consorti, whose disease the jury predicted to run 32 months from onset to death. Twelve million expressed as a monthly figure

over 32 months is $375,000, which is below the $409,090.91 monthly figure Judge Sweet extrapolated from the *McPadden* judgment.

We disagree with the district court's use of *McPadden* to justify the jury's award to Consorti for two reasons. First, rigid application of a monthly multiplier for diseases of significantly different durations is an oversimplification, as well as inconsistent with New York precedent.[11] Unquestionably, the duration of suffering is a relevant factor. But it cannot be automatically assumed that suffering which lasts 30 months, from onset of illness to death, should command a verdict three times that of a case where ten months pass from onset to death. In many cases, the degree of average daily suffering will be greater in a case where the disease progresses rapidly. The fact that McPadden's disease progressed three times more rapidly than Consorti's does not necessarily justify an award for Consorti nearly three times the size of McPadden's. Moreover, we believe the court relied excessively on federal district court precedent to justify the jury verdict, giving insufficient regard to a large number of recent New York State court decisions which strongly indicated that the Consorti award was far beyond what New York law permits.

Justice Helen Freedman is the trial judge to whom all New York asbestos litigation has been assigned by administrative order. In the period shortly prior to the Consorti trial, Justice Freedman rendered numerous judgments reducing awards in comparable cases of mesothelioma to levels far below what the jury awarded to Consorti. In *Didner v. Keene Corp.*, Justice Freedman reduced a $3.25 million award to $2.3 million; the plain-

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[11] See discussion below at n.15.

tiff had suffered 26-27 months of pain and suffering due to mesothelioma. *Didner v. Keene Corp.*, N.Y.L.J., Jan. 4, 1991, at 22 (N.Y. Sup. Ct. Dec. 17, 1990), *aff'd*, 593 N.Y.S.2d 238 (App. Div. 1993) (no discussion of remittitur), *modified*, 604 N.Y.S.2d 884 (1993). The court concluded that while Didner's pain and suffering was severe, "courts in this jurisdiction have not countenanced awards of this size for two plus years of pain and suffering." *Id.*

Four months later, in the consolidated Brooklyn Navy Yard litigation, Justice Freedman reduced fourteen pain and suffering awards in mesothelioma death cases. *In re New York City Asbestos Litig.*, Index No. 40,000/88, slip. op. at 3-5 (N.Y. Sup. Ct. May 13, 1991), *aff'd in part, rev'd in part on other grounds*, 593 N.Y.S.2d 43 (App. Div. 1993) (no discussion of remittitur), *aff'd*, 605 N.Y.S.2d 3 (N.Y. 1993).[12] The jury awards for pain and suffering from mesothelioma that Justice Freedman considered ranged from a low of $1 million, for a course of disease that took only three months, to a high of $5 million, in a case of 34 months of suffering. The jury awards thus ranged from 8% to 42% of this jury's award to Consorti. Justice Freedman found all those awards excessive under New York law. Those most comparable in duration to Consorti's were two awards of $5 million in cases where the suffering lasted 34 and 35 months (*Cohen* and *Lopez*). Justice Freedman reduced these to $3 million. And as to three awards ranging from $3.2 to $4.25 million, for suffering periods of 26 to 29 months, they were reduced to $2.2 to $2.4 million (*Chierico*, *Savella*, and *Silver*).

[12] Justice Freedman's published opinion at 572 N.Y.S.2d 1006, omits discussion of the specific remittiturs cited in the text.

While it is difficult, especially without a study of the complete record, to evaluate the pertinence of one judgment for pain and suffering for another, the strong pattern of Justice Freedman's rulings is helpful in evaluating the Consorti awards. In the face of so substantial a pattern of New York judgments communicating that New York courts find excessiveness in such cases at far lower levels, we believe it was error for the district court to conclude that the jury's $12 million award was within the range accepted by New York law.[13] We note furthermore that Justice Freedman employed the "shockingly excessive" standard, while we on appeal must use the standard of CPLR § 5501(c)—"deviates materially from . . . reasonable compensation"—a standard less deferential to the jury's appraisal.[14]

Although we recognize that John Consorti's suffering was very great, Justice Freedman's cases also all involved deaths from mesothelioma. It is not suggested to us that the suffering of the plaintiffs she considered was any less horrendous.[15] We recognize that the New

[13] In *McPadden*, the district court observed that in the state court's Brooklyn Navy Yard consolidation, "Justice Freedman allowed several multimillion dollar awards for pain and suffering . . . ." *McPadden et al.*, 798 F. Supp. at 938. Those awards, reducing $5 million verdicts to $3 million, initially served as authority justifying an award of $4.5 million to McPadden, which in turn, converted to a monthly average figure, was used below to justify this award of $12 million.

[14] Although we apply the New York "deviates materially" standard, we note that Consorti's award was also so excessive as to "shock the conscience." Hence, we would remit this $12 million award for pain and suffering even if we were to follow federal law, although application of this standard might allow for a slightly higher award than the $3.5 million figure we have allowed.

[15] We note that one of the difficulties of remittitur review is the limited data available about the particular cases used for comparison. *See* David C. Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments*, 80 Iowa L. Rev. 825 (1995); Blumstein et al., *supra*. But even if

York decisions in question were at the trial court level, and thus less compelling as authority than a decision of New York's Court of Appeals. Nonetheless, especially given the uniformity of the large number of decisions, they provide a better indication of New York law than any other authorities cited to us.[16]

we approach the New York precedents on a monthly basis—the way Judge Sweet used the *McPadden* precedent—they offer no better support for this award. Probably in recognition that the course of the disease will involve varying degrees of suffering in different periods, and that a short course is likely to cause greater average daily suffering than one which is slow to develop, Justice Freedman's judgments, stated on a monthly basis, vary roughly inversely to duration. The plaintiffs who died (or were expected to) within a year of the disease's onset received monthly sums of $110,000 to $200,000, while those whose illness lingered from one and a half to three years received between $80,000 and $90,000 per month. This provides no authority for Consorti's monthly figure of $375,000.

16 In their petition for rehearing, plaintiffs cite two new authorities in support of the jury's verdict. In *Manning v. Georgia Pacific Corp.*, No. 102757/94 (N.Y. Sup. Ct. Feb. 3, 1995), Justice Freedman remitted a $5 million verdict for pain and suffering caused by mesothelioma to $4 million. The *Manning* decision does not alter our view of the problem. First, the reduction to $4 million does not differ significantly from our reduction to $3.5 million. Second, Justice Freedman, in raising the level of damages she considered acceptable, deferred to the very district court judgments (in *McPadden* and in this case) which we here criticize for insufficient deference to *her* earlier rulings.

Plaintiffs also point to a recent decision of New York's Appellate Division, 1st Department, *In re New York County DES Litigation*, 621 N.Y.S.2d 332 (App. Div. 1995). For several reasons, plaintiffs' submissions do not convince us to change our views of the present case. First, the Appellate Division's ruling gives no information about the verdict being upheld. It simply states, "As to damages, we do not find that there has been a material deviation from what would be reasonable compensation . . . for the unique, far-ranging and severe physical and psychological injuries suffered by these plaintiffs." *Id.* at 333 (citations omitted). The decision tells neither the amounts of the verdicts, nor what they were awarded for. Plaintiffs submit a newspaper article reporting the decision, which asserts that among the judgments affirmed were judgments for $12 million and $10 million. *DES Jury Verdicts Affirmed on Appeal*, N.Y.L.J., Jan. 19, 1995, at 1. Even this source, however, does

Given the consistent pattern, over a considerable number of cases of death by mesothelioma, of reduction of jury verdicts for pain and suffering by New York courts to figures ranging from approximately $1 million to a maximum of $3 million, we conclude an award exceeding $3.5 million would deviate materially from what is deemed reasonable under New York law. Accordingly, we direct entry of a conditional order of a new trial on the issue of damages for pain and suffering, unless plaintiffs accept remittitur to that amount.

C. *Counsel's Recommendation of an Award*

OCF claims that error occurred during summation, when plaintiffs' counsel made specific dollar recommendations to the jury as to appropriate awards for pain and suffering. He suggested $8 million for John Consorti's pain and suffering to date and $4 million for future pain and suffering. He also suggested a specific figure for Frances Consorti's award. After the jury left

not tell us how those judgments were composed or what elements they included. What we do know from the opinion of the First Department is that the reviewing court considered the injuries to involve "far-ranging and severe physical and psychological injuries." *New York County DES Litigation*, 621 N.Y.S.2d at 333. Material from the briefs in the case tells us that these awards were made to women of childbearing age who—as a result of DES exposure—contracted clear cell adenocarcinoma of the vagina and other diseases. Their illnesses required that they receive radical surgery, which eliminated their reproductive capacity. The elements of suffering submitted to the jury included severe sexual dysfunction, aborted pregnancy, fear and sadness relating to the fate of unborn children, disappointment of plans to conceive a family, as well as many years of past and future suffering from cancer. The First Department's opinion states that it considers those injuries to be "unique."

In short, we have little guidance as to the exact nature of the verdicts upheld in the DES litigation, and the guidance we have tells us they involved quite different emotional considerations from those arising here. *See Nairn*, 837 F.2d at 568 (evaluating excessiveness by reference to other awards for similar injuries).

the room, defense counsel objected to plaintiffs' counsel's request.

OCF's protest is undermined by the fact that its own counsel was the first to suggest a value for Consorti's pain and suffering. Earlier in the summations, counsel for OCF told the jury:

> And I feel that to make a suggestion to you that he's not entitled to any compensation would not be fair. . . . [if you decide] that he was entitled to maybe $750,000 to maybe even a million dollars, I don't think that that would be an unfair figure.

While this court has not adopted a per se rule about the propriety of suggested damage amounts, *see McPadden et al.*, 798 F. Supp. at 936, we wish to emphasize that specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence. *See Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1172 (2d Cir. 1974) ("A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel . . . ."). A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly. While under the circumstances present here we do not yet reach the point of holding that it is error to permit such recommendations, it is not a desirable practice. We encourage trial judges to bar such recommendations.

D. *Comment by Judge*

As outlined above, after the jury returned its first verdict, the judge commented, among other things, that "you are probably the best jury that has ever been put together in the United States of America." After counsel objected, the judge gave a curative instruction. He told the jury that he had intended to praise "the way in which you have conducted yourself, not the verdict itself," and that he had no stake in their verdict.

OCF argues that the judge's comments impermissibly communicated to the jury his approval of their verdict. Judge Sweet immediately recognized that, coming on the heels of the generous verdict for Tabolt, his encouragement of the jury might be misunderstood as endorsement of the generosity of its verdict. His prompt corrective instruction cured the problem. There is no basis for a mistrial.

E. *Other Claims*

OCF asserts a number of other claims. OCF argues that the district court erred in failing to order a new trial due to the jury's receipt of extra-judicial information. A month after the jury returned its verdicts, the court received a letter from juror Carl D'Andrilli that said that during deliberations, another juror had mentioned "that Johns-Manville, a non-party defendant, possesses a one billion dollar fund to pay lawyer's fees to fight asbestos litigation cases." The district court ruled that any well-informed citizen could possess general knowledge about Johns-Manville and that the report from the juror was not prejudicial to the defendants. This ruling was certainly within the trial court's discretion.

The district court was also within its discretion in excluding the summary evidence proffered by OCF. OCF attempted to use summary evidence—analyzing Veteran and State invoices using a computer list of asbestos-containing products—to demonstrate that the Consorti family companies had purchased few asbestos-containing products from OCF. OCF did not introduce the computerized list or make it available in court or to counsel. The district court ruled that: "In the absence of the list and any testimony concerning its preparation, the summary based upon it became inadmissible." We agree. The records may not have comprised the universe of Veteran documents, and the reason for the exclusion of certain invoices from the summaries was unclear.

We reject OCF's claims that the evidence was insufficient to support the jury's findings that OCF acted recklessly and in concert with other defendants. The record contains sufficient evidence to support the jury's determination.

CONCLUSION

We have considered OCF's other claims and find them to be without merit. Based on the above, the verdict for John Consorti's pain and suffering will be set aside and a new trial ordered unless plaintiff-appellee agrees to accept an award of $3.5 million. The award for loss of consortium is vacated. The judgment of the district court is affirmed in all other respects.

(5) No. 95-719

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
VOLUME I OF II
(Pages 1 to 358)

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1995
CERTIORARI GRANTED JANUARY 19, 1996

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court
Southern District of New York
(93 Civ. 7204 (CLB))

United States Court of Appeals for the Second Circuit
(No. 94-7823)

Date	Documents
October 19, 1993	Complaint filed.
December 2, 1993	Amended complaint filed.
December 9, 1993	Answer to Amended Complaint filed.
February 2, 1994	Order of the district court granting defendant's motion to amend amended complaint and amending complaint filed.
June 27, 1994	Defendant's motion in limine to preclude certain evidence filed.
June 27, 1994	Order of the district court denying defendant's motion in limine to preclude certain evidence filed.
June 30, 1994	Judgment of the district court filed.
July 11, 1994	Defendant's motion for new trial pursuant to Rule 59 filed.
August 1, 1994	Order of the district couer denying defendant's Rule 59 motion filed.

Date	Documents
August 11, 1994	Defendant's notice of appeal from the judgment and the order of the district court denying defendant's Rule 59 motion filed.
September 12, 1995	Opinion of the United States Court of Appeals for the Second Circuit reversing and remanding the judgment of the district court filed.
November 3, 1995	Petition for Writ of Certiorari filed.
January 19, 1996	Order allowing Certiorari filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM GASPERINI,

Plaintiff.

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

AMENDED COMPLAINT

Plaintiff William Gasperini, by his attorneys, Jonathan S. Abady and Kurzman Karelsen & Frank, complaining of the defendant, alleges as follows:

JURISDICTION, PARTIES AND VENUE

1. Plaintiff is a resident of the City of Moscow in The Russian Federation.

2. Upon information and belief, defendant is a New York corporation which maintains its principal place of business in Mount Kisco, New York.

3. The damages in this action, exclusive of interest, exceeds $50,000.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332.

5. Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391.

FACTS GIVING RISE TO THE ACTION

6. Plaintiff is an accomplished and experienced photographer, photojournalist, radio and print journalist and foreign correspondent. Plaintiff is presently employed by the Columbia Broadcasting System and the Christian Science Monitor. In the past, he has been employed by other news media and journalistic organizations.

7. From on or about 1980 until 1991, plaintiff lived in and traveled throughout Central America taking photographs and working as a journalist. Included were photographs depicting soldiers, guerrillas, political leaders, and indigenous peoples in Nicaragua, Honduras, Panama, Guatemala and El Salvador. Many of these photographs were obtained in active war zones, often in circumstances involving risk of serious bodily injury or death. Others were obtained in extremely remote areas. Plaintiff's photographs captured historical events, such as United States soldiers in battle in Panama, or hidden patrols of Sandinista soldiers and their adversaries, the Contra rebels.

8. In or about January 1991, defendant solicited plaintiff's most select photographs from Central America to be included in a videotape production about the history and politics of that region.

9. At defendant's specific instance and request, and pursuant to a written contract executed between the parties, plaintiff delivered to defendant three-hundred and ten (310) original and irreplaceable slide transparencies, as described above. A copy of the contract is annexed as Exhibit "A" and incorporated herein, pursuant to F.R.C.P. 10(c).

10. Defendant lost and/or destroyed plaintiff's original and irreplaceable slide transparencies.

11. Defendant has failed to compensate plaintiff for the value of the lost slide transparencies, despite due demand therefor.

AS FOR A FIRST CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

12. Defendant breached its contract to plaintiff, causing him damages and consequential damages in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A SECOND CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

13. Defendant was a bailee and as such, is indebted to plaintiff for the value of his slide transparencies in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A THIRD CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

14. Defendant was negligent and grossly negligent in the loss and/or destruction of plaintiff's slide transparencies, thereby damaging his property in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A FOURTH CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

15. Defendant has converted plaintiff's slide transparencies, thereby damaging him in an amount to be determined at trial, but in no event less than $1.5 million.

JURY TRIAL DEMAND

A jury trial is demanded for each and every cause of action set forth herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(i) $1.5 million on the first cause of action;

(ii) $1.5 million on the second cause of action;

(iii) $1.5 million on the third cause of action;

(iv) $1.5 million on the fourth cause of action;

(v) punitive damages of $3 million;

(vi) costs, disbursements and attorneys fees; and

(vii) for such further and different relief which the Court deems just and proper.

KURZMAN KARELSEN & FRANK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates (hereinafter referred to as "Guidance Associates") by its attorneys BIGHAM ENGLAR JONES & HOUSTON, as and for its answer to plaintiff's amended complaint herein states as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in those paragraphs of the amended complaint designated "1", "4", "6" and "7".

SECOND: Denies each and every allegation contained in that paragraph of the amended complaint designated "2" except that this defendant admits that it is a Delaware corporation which maintains its principal place of business in Mount Kisco, New York.

THIRD: Denies each and every allegation contained in those paragraphs of the amended complaint designated "3", "8" and "11".

FOURTH: Denies each and every allegation contained in that paragraph of the amended complaint designated "9" except that this defendant admits that a written agreement was entered into between plaintiff and this defendant which agreement was annexed as Exhibit "A" to plaintiff's complaint and begs leave to refer to same at the time of trial and demands that plaintiff produce same at the trial of this action.

FIFTH: Denies each and every allegation contained in that paragraph of the amended complaint designated "10" except that this defendant admits that it was unable to return any slides that may have been delivered to it by plaintiff.

AS TO THE FIRST CAUSE OF ACTION

SIXTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "FIFTH" with the same force and effect as if set forth herein at length.

SEVENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "12".

AS TO THE SECOND CAUSE OF ACTION

EIGHTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "SEVENTH" with the same force and effect as if set forth herein at length.

NINTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "13".

AS TO THE THIRD CAUSE OF ACTION

TENTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "NINTH" with the same force and effect as if set forth herein at length.

ELEVENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "14".

AS TO THE FOURTH CAUSE OF ACTION

TWELFTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "ELEVENTH" with the same force and effect as if set forth herein at length.

THIRTEENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "15".

AS FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

FOURTEENTH: Any damages allegedy suffered by the plaintiff herein resulted from the acts and/or omissions of certain third parties for whose conduct this defendant is not responsible.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

FIFTEENTH: The complaint herein does not state a claim against this defendant upon which relief can be granted.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE

SIXTEENTH: Upon information and belief, this Court does not have subject matter jurisdiction over the within action.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE

SEVENTEENTH: Upon information and belief, the causes of action against this defendant are barred by the applicable statute of limitations.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE

EIGHTEENTH: Upon information and belief, plaintiff herein has failed to mitigate his damages and, as such is barred from any recovery against this defendant.

WHEREFORE, defendant, The Center for Humanities, Inc., d/b/a Guidance Associates demands judgment against the plaintiff dismissing this action, together with costs and disbursements.

Dated: New York, New York
December 9, 1993.

BIGHAM ENGLAR JONES & HOUSTON
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The Center for Humanities
d/b/a Guidance Associates

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Attorney for Plaintiff
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New York, New York 10028

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MEMORANDUM & ORDER

BRIEANT, J.

The prior direction of this Court that a trial jury be selected on February 28, 1994, is hereby withdrawn pending decision on defendant's motion to dismiss for want of subject matter jurisdiction, which will be heard on February 24, 1994 at 9:00 a.m.

By motion docketed February 14, 1994, plaintiff seeks leave to amend his amended complaint further in order to allege that he is and was at the commencement of this action a citizen of California. The amended complaint in the action alleged that plaintiff is, "a resident of the City of Moscow in the Russian Federation", as did the initial complaint. Leave to amend is freely granted. Accordingly, plaintiff's motion to amend is granted at this time so as not to delay resolution of this matter. Defendant is deemed to have denied the juris-

dictional allegations as amended, and defendant's motion to dismiss will be deemed directed to the amended complaint.

On the return date of that motion, plaintiff shall be prepared to present such documentary evidence, if any, which will establish to the satisfaction of this Court that he is in fact a citizen of the State of California.

SO ORDERED.

Dated: White Plains, N.Y.
June 30, 1994

/s/ CHARLES BRIEANT
Charles L. Brieant
U.S.D.J.

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that the undersigned will bring on the annexed notice of motion to dismiss plaintiff's complaint for lack of this Courts' subject matter jurisdiction pursuant to FRCP Rule 12 B for hearing before this Court, at Room 31, United States District Court, Southern District of New York, U.S. Courthouse, 101 East Post Road, White Plains, New York 10601-5086, on the 25th day of February, 1994, at 9:00 a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, New York
February 11, 1994

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities
d/b/a Guidance Associates

By /s/ KARIN A. SCHLOSSER
Karin A. Schlosser (KS 4055)

Office and P.O. Address
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(212) 732-4646

Motion Denied. See transcript for oral decision.

SO ORDERED.

February 24, 1994 /s/ Charles Brieant
U.S.D.J.

FILED
U.S. DISTRICT COURT
FEB 24 1994
S.D. OF N.Y.

MICROFILM
FEB 24 1994-10:00 AM
U.S.D.C. SCNY WP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MOTION IN LIMINE

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BIGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, White Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the pre-

vailing decisional law establishing that no such "industry standard"

Motion Denied. See transcript of trial for oral decision.

SO ORDERED.

June 27, 1994

/s/ CHARLES L. BRIEANT
USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,

Defendant.

U.S. Courthouse White Plains, N.Y.
June 27, 1994 9:45 a.m.

JURY TRIAL BEFORE:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

SAMUEL A. ABADY, ESQ.
JONATHAN S. ABADY, ESQ.
Attorneys for Plaintiff

FRANCIS A. MONTBACH, ESQ.
KEVIN H. YOUNG, ESQ.
Attorneys for Defendant

Sue Ghorayeb, R.P.R., C.S.R.
Court Reporter

[2] THE CLERK: William Gasperini against the Center For Humanities, Inc.

THE COURT: As I understand it, we have some kind of in limine motion which seeks to prevent the introduction of testimony or evidence.

MR. MONTBACH: Yes, your Honor.

THE COURT: Ordinarily, those motions have an uphill struggle because the test for the validity of facts is sworn testimony and cross-examination.

MR. MONTBACH: Your Honor, as presented in that motion, that motion impacts on a lot of the testimony which I think is—the subpoenas and supposed expert witnesses—new expert witness that was served on us on Friday, which we objected to all throughout this litigation.

THE COURT: Kindly use the lectern.

MR. MONTBACH: Throughout this litigation, your Honor, we have heard talk of an industry standard of a minimum of $1,500.

THE COURT: I understand that you claim no such standard exists.

MR. MONTBACH: No such standard exists, your Honor.

THE COURT: Why isn't that a jury question?

MR. MONTBACH: Because it's a legal question, [3] your Honor. The case law in New York clearly shows there is—no such standard exists. There is a measure, uniqueness of the slides, the earning history of the photographer, but not a knee-jerk each slide is $1,500 a slide. I think that's extremely prejudicial in front of the jury.

THE COURT: It's so absurd that subject to cross-examination will make the claim look outrages.

MR. MONTBACH: Your Honor, I understand. It is going to look absurd.

THE COURT: The Court will instruct the jury the market value of an item is what a reasonable buyer, reasonably well-informed, would pay from a similarly situated seller, and that's what they are to go by. And the fact that some society may have a minimum value doesn't mean everything sells for that price. The existence of the standard may be some evidence as to what people get.

MR. MONTBACH: Your Honor, we have here a photographer who is not a member of that society, is not a member of the industry.

THE COURT: That goes to the weight, doesn't it?

MR. MONTBACH: I understand, your Honor, but I don't want this—

THE COURT: Motion denied.

[4] MR. MONTBACH: Your Honor, may I make my statement for the record then?

THE COURT: Indeed. Isn't it adequately covered in your brief?

MR. MONTBACH: It is somewhat, your Honor. But getting in front of the jury—they have subpoenaed records on supposed payments we have made on receipts that we supposedly did with another business, with other people, that has this $1,500 number in it. We have now two experts supposedly, one named Friday afternoon, who we are going to object to.

THE COURT: Well, maybe I ought to let you finish this because I have already ruled on it. You are just talking to hear yourself.

MR. MONTBACH: No, your Honor. I am trying to explain myself.

THE COURT: Five minutes to talk to hear yourself.

MR. MONTBACH: We have a subpoena served asking for records of contracts with other organizations or slides, that

has nothing to do with this case, from 1960 to date. I am going to move to strike that part of the subpoena.

THE COURT: That will be denied also.

MR. MONTBACH: Your Honor, we have a subpoena [5] served for financial records of the corporation. That has nothing to do with this case.

THE COURT: What's the purpose of that?

MR. S. ABADY: I am sorry, Judge.

THE COURT: Subpoena for financial records of the defendant.

MR. S. ABADY: Yes, your Honor. It came out in deposition that the defendant's appreciation of its exposure and the value of the loss may well be reflected in financial records of the corporation particularly.

THE COURT: So what?
What is the probative value of that?
Someone keeps prudent accounting records and takes a reserve against potential liability. Is that what they did?

MR. S. ABADY: We don't know, your Honor, until we see the records.

THE COURT: If you don't know, don't worry about it. I will vacate that part of the subpoena.

MR. S. ABADY: Judge, may I clarify the record then. As your Honor knows from your experience and practice that accountants, for example, seek statements from attorneys—

THE COURT: I have made a ruling. I made a ruling. The ruling happened to be a correct one. You can [6] have an exception but don't waste my time.

MR. S. ABADY: I will sit down, your Honor.

MR. MONTBACH: You haven't ruled on what I called delivery memos, delivery invoices from other organizations for The Center For Humanities, when there is no delivery memo involved in this lawsuit.

THE COURT: I don't know how they are relevant. Maybe they are. There is a difficulty with in limine rulings because it's a temptation to rule without a full understanding of why something is being offered.

MR. MONTBACH: I understand, your Honor.

THE COURT: I don't see that they are relevant.

MR. MONTBACH: They have asked for the records from 1960 to date. Half the records are up in a mountain.

THE COURT: If they are up in the mountain, you can't bring them down.

MR. MONTBACH: We have brought in what we have, if any such exist.

THE COURT: Produce all you have. All of that should have been done in pretrial discovery.

Mr. MONTBACH: Thank you, your Honor.

THE COURT: Anything else?

MR. MONTBACH: No.

MR. S. ABADY: Judge, as to your comment about—as to your comment about value, I would just ask the Court [7] to—when you have an opportunity—to look at pages 15 to 25 of the pretrial brief because it discusses the fact that New York courts have repeatedly recognized the $1,500 minimum value.

THE COURT: It's only some evidence.

MR. S. ABADY: I understand, your Honor.

THE COURT: It's not binding. It's not controlling. It's some evidence. No witness is going to testify that every transparency that's sold gets that price. Some obviously get more, some get less. So, it's some admissible evidence but it's certainly not binding. If you put too much emphasis on it, your case will lose credibility.

MR. S. ABADY: Also, your Honor, it is not market value but actual value which is discussed in the brief.

THE COURT: Market value is actual value. This is an article of trade.

MR. S. ABADY: Those are two distinct concepts. I don't want to recapitulate—to repeat.

THE COURT: It has no actual value beyond what a person will pay. Nothing does. This is his stock in trade. This is merchandise. This is a deal between merchants.

MR. S. ABADY: Judge, let me just leave the issue now. I know when you have the opportunity you'll review [8] the memorandum for the value you find that it has.

THE COURT: What do you say actual value is?

MR. S. ABADY: Actual or intrinsic value is a concept apart from market value. It's laid out in point B on pages 16, 17, 18 to the top of 19.

THE COURT: Well, I really don't think so.

MR. S. ABADY: You will have an opportunity to read it and see the discussion.

THE COURT: I really don't think so. I am reasonably well persuaded we are talking about market value. Some of the things they are talking about in there are things which have no value. This was material offered for sale, was it not?

MR. S. ABADY: Not for sale, your Honor, but for reproduction rights.

THE COURT: Sale of part of the totality of ownership.

MR. S. ABADY: The cases discussed, beginning at page 16, have to do with the loss of photographs and other valuable papers—

THE COURT: Court has to take a recess.

MR. S. ABADY: —which may have no market value.

THE COURT: Well, I think this stuff had a market value or they wouldn't have wanted to have it. I am reasonably well set but I will study your submission here.

[9] MR. S. ABADY: That's all I ask.

THE COURT: I am reasonably convinced market value loss is the measure of damages here. Maybe because you don't agree on such a basic, simple thing as that which prevents you from settling this case.

MR. S. ABADY: The insurance coverage is the only thing that prevents settlement, your Honor.

THE COURT: Court will be in recess for the moment.

(Recess)

THE COURT: The record should show that juror Paneissa called and said his uncle died. The mother of juror Hoffinbacher called the Clerk Office and said he was ill over the weekend and he was going to the doctor this morning. So, as a result, we are down to six jurors.

How long for your opening?

MR. MONTBACH: Your Honor, I have one more question to bring—I am sorry to burden the Court with this.

THE COURT: I don't mind being burdened but I dislike delay. What's the question?

Mr. MONTBACH: The issue—they have named on Friday afternoon an additional expert witness who was previously called as a fact witness.

THE COURT: So, it's no surprise to you. I have [10] to try the case.

Mr. MONTBACH: It is, your Honor.

THE COURT: How can it be a surprise if he is a fact witness?

MR. MONTBACH: He is listed as a fact witness. Now they are trying to make him an expert witness.

THE COURT: What's your application?

MR. MONTBACH: That he not be permitted to testify as an expert witness.

THE COURT: Motion denied.
How long for the opening statement?

MR. S. ABADY: 20 to 30 minutes, Judge.

THE COURT: No more than that.
How long for you?

MR. MONTBACH: Five to ten minutes.

THE COURT: Fine. Bring in the jury.

MR. S. ABADY: One other housekeeping matter. Forgive me. I don't mean to frustrate, your Honor, but I figure you want this out of the way in the beginning.

Two things. One, we've subpoenaed as Mr. Montbach indicated, certain documents from the defendants, and I have not been given that document production. Now I wonder whether I would have a chance to examine them after openings.

THE COURT: Not before openings because you won't [11] have more than half a minute before opening.

MR. S. ABADY: I requested it earlier.

Second thing, your Honor, I have subpoenaed—in light of your admonition to me not to run out of witnesses, I have subpoenaed four witnesses from the defendants.

THE COURT: Why don't you put them on this morning out of order?

MR. S. ABADY: I understand some of them may not be coming. Now, it may not matter in terms of the number of people we have.

THE COURT: You know, you are just anticipating trouble. If you get a situation where they are not coming, then I would find out about it and I will make him wish they have.

MR. MONTBACH: They are on telephone notice. They are coming.

THE COURT: I can only run for about two hours. Don't waste my time.

MR. S. ABADY: Would your Honor inquire of the jury if they ever heard of Robert Zentmaier?

THE COURT: No. That should have been done on jury selection.

MR. MONTBACH: This is a new witness that hasn't been named. I don't know who this person is.

[12] MR. S. ABADY: Because we have just discovered him, your Honor, just the last few days.

THE COURT: You better give me an offer of proof before you call him. We have to come to an end some time.

MR. MONTBACH: Your Honor, may I hand up the exhibit list and jury instruction requests?

THE COURT: Yes.

(Jury present in the courtroom)

THE COURT: Will you all kindly take your oaths as trial jurors.

(Jurors sworn in to try the case)

THE COURT: Thank you. Please be seated.

The order in which the trial will proceed is as soon as I finish speaking, the attorney for the plaintiff will make a brief opening statement to you. That statement is not evidence. Nothing a lawyer says is evidence unless they have stipulated to a fact, and questions aren't evidence, only answers.

As soon as he is finished, the attorney for the defendant may, if he chooses, make an opening statement although he is not required to since the plaintiff has the burden of proof in the case.

After the opening statements we will begin to hear witnesses. First, the plaintiff's side of the case, then the defendant may call witnesses. If it does, [13] plaintiff may call rebuttal witnesses.

After all the witnesses have testified, the attorneys will make closing arguments to you in which they will attempt to summarize the evidence for you and argue to you what conclusions or inferences they think that you should draw from the evidence. After that's been finished, the Court will instruct you as to the applicable law which concerns the case.

Now, until you have heard all of that, including the Court's instructions as to the law, it's important that you keep an open mind. Don't discuss the case with each other or anybody. Don't reach any conclusions until you have heard everything. And then, after you've heard it all, you will deliberate with each other and reach a fair and impartial verdict.

If you happen to be in the elevator and someone starts to talk about the case, you just tell him, "Stop. I am a juror," because you are obligated to keep yourself free from anything that might taint your verdict.

The scheduling here is we will run until about noontime today, then we will break for today. There will be no court on this case tomorrow and we are resuming on Wednesday, at 9:45 on Wednesday morning.

All right. At this point, Mr. Abady, you may make an opening statement on behalf of the plaintiff.

[14] MR. J. ABADY: Thank you, Judge.

May I use the lectern, Judge?

THE COURT: Yes. Everyone has to use it.

MR. J. ABADY: May I proceed, Judge?

Good morning. A picture is worth a thousand words. It's a phrase we have heard so often, it's become a cliche. It's a cliche.

THE COURT: No more cliches. Just tell them what you expect to prove, not to argue, not to talk about the law. Just say, "we will prove the following facts in this trial."

MR. J. ABADY: Yes, Judge.

This is a case about photographic images. It is about 310 unique, irreplaceable, original slide transparencies. It is about the value of those slide transparencies.

My name is Jonathan Abady. I represent the plaintiff, William Gasperini, who is seated here at plaintiff's table. I am representing Mr. Gasperini with Samuel Abady, who is my co-counsel.

The defendant in this action is also represented by his attorneys—the defendant is actually a corporation—Francis Montbach and Kevin Young, who will be representing the defendant.

As Judge Brieant told you when you were selected [15] as jurors several weeks ago, this is a case about a photojournalist, our client, Mr. Gasperini, who over the course of seven years took a series of photographs in Central America.

Mr. Gasperini is a professional photojournalist. You will learn he then gave those photographs approximately four years ago, in 1990, to the defendant corporation. The defendant corporation you will learn is Guidance Associates, also known as The Center For Humanities. The defendant corporation you will learn has a long history in dealing with photographic images, still photography, video and film.

You will hear from the president of the defendant corporation that they solicited Mr. Gasperini's slides because they discovered that he had amassed a large body of work about the history of the wars and political activities in Central America; and they specifically solicited Mr. Gasperini's slides because at that time he was the only person that they knew of who had that kind of body of work.

There are only two issues in this case, how many slides were lost and what their value is.

This part of the trial is the opening statement. As the Judge told you, it's kind of like a road map. It's a preview of the evidence. There will be two kinds of [16] evidence in this case. There will be documentary evidence in the form of letters, contracts, forms and memos, and there will also be live testimony, witnesses, ordinary witnesses and expert witnesses.

After you have heard all of the testimony in this case, after this case has been fully presented, we will prove to you that the value of each of the 310 slide transparencies that the defendant lost was the industry standard of $1,500 per transparency at a minimum, at a minimum. That because of the unique subject matter of these particular slides and the conditions under which they were taken, the proper value is actually more than the standard of $1,500.

Let me tell you a little bit about the specific evidence that you are going to hear. One of the people that you will meet during the case of this trial is William Gasperini, and you will learn that Mr. Gasperini is a unique and extraordinary individual with a distinguished career in journalism.

You will see that with the exception of Australia and Antarctica, Mr. Gasperini has traveled the entire globe. He has worked in some of the most conflictive, dangerous regions of the world, and he has reported on the major events of our day there.

He worked in the Gulf War in the Middle East, in [17] the U.S. invasion of Panama. He covered the collapse of communism in the Soviet Union and the massive humanitarian efforts recently of the United States to help thousands of starving children in Somalia.

You will learn that Mr. Gasperini is a particular type of photographer. He is not an ordinary photographer. He is what's known in the industry as a photojournalist.

You will understand—you will hear that a photojournalist typically, who works abroad, frequently lives abroad. And you will see that Mr. Gasperini speaks a number of different languages, that he has become an expert on culture, history, politics and the life of these regions. And that is why his photographs have a particular and unique value, because he has detail appreciation of the culture, politics and the life of these regions.

So, it's very different for someone who is an expert on a particular region to take photographs seeking to document historical events. It is different for that person to be sent out to take photographs than for someone who has never been in the region, who doesn't know what the indigenous communities are like, who doesn't know what the political issues are. That is a unique type of photography. It will be critical for

you to appreciate that difference between ordinary photography and [18] photojournalism.

You will see that Mr. Gasperini is most familiar and spent most of his professional career in Central America. Between 1983 and 1990, Mr. Gasperini spent almost seven years in Central America, at a period when that region of the world was at the center of world attention.

You will see that he covered all of the major issues in that region: The conflict in El Salvador where tens of thousands of people were killed. The conflict in Nicaragua where many thousands of people were killed. The U.S. invasion of Panama and the falling of General Manuel Antonio Noriega. He covered the war—guerrilla fighting in Guatemala, many times at substantial personal risk.

You will see and you may hear evidence from the defendant that Mr. Gasperini—you may hear a suggestion that he is not a professional photojournalist. Mr. Gasperini is a professional photojournalist. We will prove that to you. You will see he has taken over 10,000 slides in his career. He took 5,000 slides over the approximately seven-year period in Central America.

What's critical to understand is only a small percentage of a large shoot, of a large body of work like that has a permanent lasting market value. Typically, photojournalists take shots. They may take two or three [19] rolls, and only one or two pictures has the correct depth of field or right lighting conditions, right exposure taken at the right angle and right subject matter to actually capture the image and you have the permanent lasting market value.

The way that a body of work of several thousand slides is distilled down to those select images is the editing process. You will see that after the defendant corporation contacted Mr. Gasperini, he engaged in an extensive, careful editing process of all the slides of Central America that he had taken. That editing process took him a year. He distilled the photographs down to the finest 300 images. There was 300 images after that editing process that had permanent market value. Those were his select images.

You will see that Mr. Gasperini never intended to leave those slides with the defendant corporation. The original plan, you will see, was that Mr. Gasperini would work with the defendant corporation to help produce a video, to help write the script and to select the slides. But you will see that after turning over the slides to Guidance Associates, the project lagged, there was a delay, and it was in February of 1991 and war broke out in the Middle East.

Mr. Gasperini was sent by CBS News to cover the [20] war in the Middle East. The defendant corporation persuaded him to allow them to keep the images, to allow them to work on the project. It turned out to be a tragic event, as you will see, because that was the last time that Mr. Gasperini ever saw those 300 select images. He left the 300 images with the defendant. He never saw them again. They are gone.

The loss you will see is particularly tragic because Mr. Gasperini never had an opportunity to fully market those slides. Mr. Gasperini worked in Central America for seven years. He did sell a number of photographs to newspapers that he wrote stories for but that he was not making an intensive effort at that time to market those photographs. He was not concentrating on marketing the photographs.

As radio and print photojournalist, his immediate news gathering was in radio and print. Photography, unlike those mediums, has a lasting permanent value and cannot be realized on the market until an edit such as I have described has occurred. Ironically, Mr. Gasperini had not done the edit on his work until the defendant approached him.

You will see that Mr. Gasperini does not intend to spend his entire life abroad, that he plans to return to the United States and live in the United States. It [21] was that body of work that he was amassing from Central America that is no longer available.

You will hear testimony—in addition to testimony from Mr. Gasperini, you will hear testimony from his mother, Charlotte Gasperini, and Miss Gasperini will tell you that she was contacted also by the defendant corporation in early 1990 and spoke with the president of the company, and the president of

the company solicited additional slides from her for use in a promotional catalogue. And Charlotte Gasperini, who lived close to the corporate headquarters of the defendant, delivered an additional ten slides to the corporate headquarters and those slides were also lost. So, you will see that the total amount of slides lost by the defendant is 310 slides.

You will see and we will prove to you that these slides were extraordinary photographs, that they were beautiful professional images. In many cases, they were spectacular and stunning. They were not slides taken by a hobbyist or amateur. They were taken by a professional photojournalist.

The slides were taken by Mr. Gasperini at tremendous risk to his life and limb. There are slides that were lost by the defendant that Mr. Gasperini took while he was being fired upon by helicopter gun ships in [22] El Salvador. There were slides that were taken while a colleague of Mr. Gasperini was shot only a few feet from him.

There are images that the defendant lost where Mr. Gasperini was captured by Nicaraguan soldiers in the jungles of Nicaragua. Those slides are lost. There are shots also of historical figures, from peasants to presidents.

All of Central America's presidents were photographed by Mr. Gasperini: Oscar Arias, former president of Costa Rica and a Nobel prize winner. The former president of El Salvador who is now dead. Daniel Ortega, former president of Nicaragua, and Violeta Chimorzo, the current president of Nicaragua.

All those photographs taken at critical moments in history. You will hear about moments of history like the historic peace conference in Guatemala. All of those shots were lost. There were shots of peasants and villagers taken many times in remote areas only reached by horseback or tremendous amount of travel.

There are shots that covered the culture and history by someone who has a trained eye and who had spent their life studying those regions. Those are the types of exceptional photographs that were lost.

You will hear from the current president of the [23] defendant corporation, Guidance Associates, William Goodman. You will see that William Goodman is a sophisticated businessman. He graduated from Princeton and Columbia universities, and he will explain to you that the defendant corporation had an extensive history in dealing with photographic imagery. They had an extensive history of dealing with stock photography.

They employed people with expertise and training in knowing how to deal with stock photography. They have more than 10,000 images in a warehouse in Lyon* Mountain. They have thousands of slide transparencies on their premises at 90 South Bedford Road. The company has made millions of dollars over the years off of these slide transparencies.

They are a company that is fully familiar with the industry standards. And you will get an indication from the testimony of the president of the corporation of what the value of these slides was because you will see that when he discovered—when they discovered that the slides were missing, they conducted an exhaustive, panicked search. They looked for these slides for over a year before they acknowledged that they were lost. And the reason that they looked so furiously, you will see the reason they looked so long before acknowledging the loss is because they knew the value of the slides.

[24] You will see there is a written confirmation, written proof that 300 slides were delivered by Mr. Gasperini. There will be no genuine issue about the number of slides because of that written proof signed by the president of the corporation and indicating that the 300 slides were lost.

But you may hear from the president of the defendant corporation, you may hear him say to you that he is not aware of the industry standard, that he doesn't know it exists. And you may hear testimony from the defendant corporation that no such industry standard of $1,500 for the damage or loss of a slide transparency exists.

You will learn a significant amount about photography by sitting through this trial. One thing we will prove to you dur-

ing this trial is that there is an industry standard, that the defendant knew about it and that it is $1,500 per transparency.

We will show you that through documentation, through memos, and we will show you that in part by documents and memos that were coming in and out of the defendant corporation for almost twenty years. And so, the claim that the industry standard does not exist and that the defendant did not know about it is a claim we expect to disprove in a resounding way.

[25] In addition to the documentary evidence, you will also hear witnesses testify about the existence of the industry standard. You will hear from Robert Zentmaier. You may hear from Robert Zentmaier, who is the president of one of the larger stock companies in the United States called Photo Researchers. Mr. Zentmaier will tell you and testify to the existence of the industry standard.

He will tell you that it is known by everyone in the industry and he will tell you that his stock agency has had a particular course of dealings with the defendant corporation that went back to 1977 and goes throughout the 1980s and into the 1990s. And during the course of that interaction with the defendant corporation, memos were sent, memos were received, memos were signed by the defendant corporation with the terms and conditions of the industry standard written all over them.

You will see that in 1977 this corporation lost slide transparencies and paid a fee pursuant to the industry standard. You will see that this company has continuously been in receipt of slide transparencies and knows the value of them. And so, while you may hear from the president of the corporation that no such industry standard exists, you will hear some very contradictory evidence from Mr. Zentmaier.

You will also hear from the Chief Executive **[26]** Officer for The Center For Humanities, Jack Goodman, he is a man who's been in the business—it's a family business—for several years. He knows about the industry standard. He knows it's $1,500.

You will hear from the financial officer of this corporation and she will testify that after the loss occurred, she had meetings with the Chief Executive Officer of the defendant corporation and she had meetings with the president, and they discussed value, and of course, they discussed the industry standard. They specifically discussed the industry standard of $1,500. You will hear that from the chief financial officer.

And then, finally, you will hear from some very special witnesses. You will hear from a man named William Kuebler. Mr. Kuebler is an accomplished photographer in his own right. He was chief photographer of one of the local suburban newspapers here. His work was published in U.S.A. Today, the National Inquirer, Next Magazine.

He is one of the chief photo editors of the Gannett newspapers service. As you know, Gannett is one of the largest newspaper media organizations in the world. They own 83 newspapers. They have a staff of thousands of photographers. Mr. Ruebler's editorial decisions involved the supervision of 16 award winning professional photographers.

[27] You will see that Mr. Kuebler is intimately familiar with Mr. Gasperini's work, that he has viewed thousands of his slides. And you will see that—Mr. Kuebler will tell you that Mr. Gasperini is not only clearly a professional photojournalist but he is an excellent photojournalist, that Mr. Gasperini's work is on a par with the award winning photographers that Mr. Kuebler supervises on a daily basis.

Then you will also hear that opinion of the quality of Mr. Gasperini's work supported by an employee of the defendant corporation. You will hear testimony from a woman named Susan Green. Susan Green is the woman who was employed by The Center For Humanities, who handled the 300 images that Mr. Gasperini turned over to the defendant corporation. And Susan Green will describe Mr. Gasperini's work as first rate.

Finally, you will hear from a woman named Jane Kinne. Miss Kinne is perhaps the nations leading expert in the evaluation of photographic images. She worked in the field for many decades. She testified in hundreds of cases.

You will learn from her about the industry standard. You will learn there is nothing new about the industry standard. It has existed for more than 25 years. You will learn that it is published and printed in every **[28]** major guide to industry practice that is available to photographers and publishers.

You will see that the industry standard of $1,500 is printed all over the delivery memos of all of the stock agencies, that it is in the handbook by the American Association of Picture Professionals.

You will hear from Miss Kinne the industry standard of $1,500 is not an arbitrary standard. It is not a standard that was developed by photographers for photographers. It was the result of a national commission on valuation being set up, which was composed of every possible component and player in the photographic industry; not only photographers but agents, advertising agencies, major publishers, major news organizations; all played a role in establishing an industry standard.

And Miss Kinne will explain to you why prior sales history is not the critical element in evaluating the value of a slide transparency. It is not.

She will describe for you how photographs are placed in stock agencies and how they have repeat value. How particularly photographs with historic and cultural content have cyclical and recurrent value, that they can sit in stock agency draws for ten, 15, twenty years, and when they become relevant again, they are used.

An example you will hear is the D-Day invasion. **[29]** There are photographs that sat in stock agencies—you will hear testimony they sat in the stock agency for 50 years, then during the D-Day celebration sold for thousands and thousands of dollars.

You will hear from the defendant corporation that for the one time use of a photograph they pay up to $700. So that if Mr. Gasperini's images sold three times, they would already have earned $2,100. Well in excess of the minimum standard.

So, you will hear Miss Kinne describe to you how the industry standard of $1,500 is actually considered a conservative estimate for photographs that have permanent lasting market value and that had been properly edited.

At the close of this case you will see that Mr. Gasperini is a person who has made a tremendous amount of sacrifice in his life. He has worked and lived abroad. He has made a salary that is less than he could have made had he worked in the United States as a journalist. He made the sacrifice for long-term gain.

He was young. He was in a position to take risk. He was hungry for knowledge. He went out and traveled around the world. He traveled extensively in Central America working for the major news organizations in this country. He selected images. He built a body of work.

It was his intention to take that body of work **[30]** and to realize the market value when he came back to the United States, to edit those photographs, to write a book, a retrospective book like many of his colleagues have written on all of his travels and experiences in Central America, to sell that book.

It was his intention to exploit the exploding market of computer technology, to market his slides for sales in that industry, to place them with stock agencies, to use them for the life of the copyright plus 50 years, which is where the value comes from and you will hear about that. He has not the ability now to do that. Those images are gone. Those original transparencies are lost that he spent seven years of his life collecting.

At the end of this case, it will be clear to you that an industry standard exists, that the defendant corporation knew about the industry standard, and that at the very minimum Mr. Gasperini is entitled to the industry standard for the 310 photographs that he worked so hard to get. Thank you.

THE COURT: All right. Thank you, sir.

Mr. Montbach, you may make an opening statement on behalf of the defendant, if you wish to do so.

MR. MONTBACH: I do, your Honor. I will make it very brief. Thank you.

MR. S. ABADY: Judge, your Honor, before we [31] proceed with the defense opening—

THE COURT: No. Just sit down. Let him speak, will you?

MR. S. ABADY: I wanted to ask that his witnesses be sequestered.

THE COURT: That's your right under the rules. If there is any witnesses that were not a principal, they have to sit outside.

MR. S. ABADY: Thank you, Judge.

MR. MONTBACH: Good morning, ladies and gentlemen. I am happy to see you again after that long delay before the trial started.

THE COURT: Don't worry about the delay. The delay from hence forward is what I am concerned about. Just stick with the facts you intend to prove.

MR. MONTBACH: Yes, your Honor.

THE COURT: The delay was not the fault of this Court.

MR. MONTBACH: I didn't ascribe any fault, your Honor.

THE COURT: Get away from it.

MR. MONTBACH: What we are going to show you here is that this was not strictly a commercial transaction. The testimony that we will be offering will show that through mutual friends Guidance Associates came into [32] contact with Mr. Gasperini and an attempt was made to make a little money for both parties. This attempt was to create a video to be used in high schools concerning the events in Central America.

You will hear testimony to the effect that, unfortunately, at the time this video was being made, the market for such videos had virtually ended. It was a market that had been in existence for many years, but now, because of events beyond the control of high schools and Guidance Associates, that market did not flourish anymore.

The testimony will show that Guidance Associates really didn't seek out Mr. Gasperini. When he came in with his slides after mutual agreement, they were put into a video, and Miss Green, who is going to testify for the plaintiff, Miss Green is a former employee of Guidance Associates, created a video; not using just Mr. Gasperini's slides but using actual video and also archival material. And you will see there is—a three volume video was made. Unfortunately, that video did not sell.

Now, the agreement between—you will see from the testimony the agreement between Guidance Associates and Mr. Gasperini was for royalties. There was no agreement—there was no delivery memo. You heard talk of delivery memos. Here there was no delivery memo [33] ascribing value to the slides. There was no consideration for these slides or anything. There was a royalty agreement.

Pursuant to that royalty agreement Guidance Associates paid a certain amount of money based on the gross revenues of this video and sales, and has paid those monies to Mr. Gasperini. They continue to pay those monies.

You will also find that when it became apparent the video was not selling very well, Mr. Gasperini approached Guidance Associates about his compensation. This approach was made when it was known that, unfortunately, the slides were missing.

You heard the speech about how we would not acknowledge the slides were lost for a year. It was known the slides were missing and they kept on looking for them. Unfortunately, they had to give up at a certain time. In fact, they are still looking now.

During that time period, Mr. Gasperini approached Guidance Associates and said he hadn't been compensated enough because the video wasn't selling. Guidance Associates outside of what was called for in the contract made payment to him, a voluntary payment of $3,500, which Mr. Gasperini took.

We do not deny that the slides have unfortunately [34] been misplaced and cannot be located at this time. Correctly, we searched for them. Every—almost every employee of the

organization searched for them. A search was made in storage where they shouldn't have been and they weren't there.

It will be nice to be able to come into court today and say, "Here they are. We found them," but we unfortunately can't. Unfortunately also, Mr. Gasperini did not make any copies of his slides before he gave them to us. He intended to. And the testimony that he gave during the pretrial deposition does not agree with what counsel has said he is going to testify to. He gave us those slides and meant to make copies but he said he had to go off to the Gulf War. It's not at least what Mr. Gasperini said.

We had them for a while. He worked with our people. Then he had to go off to the Gulf War. He had ample time to make copies but he didn't do that.

Guidance Associates, we will establish, has lived up to its contract. As I said, it has paid him more than they were supposed to. We understand that he's had a loss. We are not saying he should not be compensated for that loss but what we are saying, one is, there is no industry standard. We will have expert testimony that there is no industry standard.

[35] And two, we are saying these slides, as interesting as they are, one, are not unique, and two, Mr. Gasperini does not have a history of earning any money from these slides or any of the slides which he took while he was in Central America.

In fact, we would not call him a photojournalist. We would call him a journalist who happened to take photos while he was down doing his job as a radio journalist or print journalist in Central America. We are not saying he doesn't take good pictures. We will not deny these pictures were good enough quality to be used in the video we put together.

It's sort of like the old philosophical argument question, if a tree falls in the forest and no one is there to hear it, it doesn't make a noise.

Mr. Gasperini kept all his pictures at his mother's home in shoe boxes in a room. Actual slides or pictures that have been taken by someone who is not a photojournalist, sitting in somebody's house, his mother's house, have a value when he doesn't market them.

The testimony of Mr. Gasperini himself will establish that over the seven years between 1984, when he started taking these pictures, and 1990, when pictures were given to us, he earned $7,000 total from the sale of his pictures. These include $2,000 that he earned from **[36]** pictures he took when he took a sabbatical while he was in South America. I think it was 1988, '89. The testimony will establish that then he went to Asia.

So, he earned $5,000 roughly over a seven-year period from the sale of these slides, yet he wants $5,000 for each. This case is not for $1,500. Mr. Gasperini has sued Guidance Associates for $1,500,000. They want you to value each and every one of these 300 and so slides at $5,000 each without proving that he has earned any money from them.

When he took pictures as a photographer down in Central America and sold them to the newspaper that he worked for, he would get $50 a picture. His testimony will establish that.

You heard testimony about the video market and also the computer market for computer games. Yes, Mr. Gasperini's testimony will establish he earned $2,000 back in—I think it was 1987, from the sale of 14 slides for use in an interactive video game.

Actually, the only money he has really earned, real money he's earned from his photography in the last decade has come from Guidance Associates. He has slides of his own he took during the Gulf War. These are the only ones he has given to a stock agency.

None, absolutely none—as far as we know as of **[37]** the date of his deposition—of his slides were given to an agency to market them. He never marketed the slides at all. There was never any demand for it.

But the ones he did market of the Gulf War, the most he earned on the latest figures he's given us over a three-year period is a total of $366 for the use of those slides. Seven pictures were used during that time period. In 1991, he earned a hundred dollars. In 1992, he earned $92. And in 1993, last year, he earned a $174 from the reuse of those slides.

Now, the argument would be he is in a dangerous area in the Gulf War also. The fact is—I think you know it from your common knowledge—there were many, many, many photographers down in Central America at the time of the conflicts down there. Almost every newspaper had pictures of Central America, of the Contras, of the Sandinistas, of the people in El Salvador. There were terrible pictures but there were pictures around. They are still available.

Mr. Gasperini has kept his pictures in his mother's house. He may have distilled some down and given them to us, but in fact, there are copies of those pictures and they are still available. At least 40 of them were given to the high school, Horace Greeley High School in Chappaqua. Those are available and can be used.

[38] You will hear testimony about pictures he sold to a newspaper. Don't go by my recollection, go by the testimony. Only one was reused and each time at $50. And since 1984, '85, '86, there has never been any demands for the use of those pictures.

So, we are saying, he is entitled to compensation but certainly—and we are saying an industry standard doesn't exist—but certainly not in the amounts being sought by the plaintiff.

In fact, what we think the plaintiff is asking you to do is to speculate and to guess what is going to happen in the future some time if Mr. Gasperini at some point in time decides to market pictures.

You have to guess whether there is a demand for it 50 years from now; if somebody is going to pay for a book put together by Mr. Gasperini when there are, I would think, literally thousands of other photographers and hundreds of thousands of other pictures of what happened in Central America available, put in stock houses from other photographers.

So, we are just asking you in this case to use your common sense. You will hear our expert as to what he considers the fact of these slides to be and you will hear their expert. Just take into consideration both experts and use your common sense.

[39] Thank you very much.

THE COURT: All right. Thank you, sir.
Plaintiff may call the first witness.

MR. S. ABADY: Your Honor, before I do, I would like to make a motion at this time.

THE COURT: No motion. Just make—call the first witness. You can make a motion at the next recess. We can't waste time.

MR. S. ABADY: Sorry, your Honor.

THE COURT: Just bring in the next witness.

MR. S. ABADY: The plaintiff calls the president of the defendant, William Goodman, to the witness stand.

WILLIAM GOODMAN having first been duly sworn, was examined and testified as follows:

THE COURT: State your full name for the record please, spelling your last name slowly.

THE WITNESS: My name is William E. Goodman, G-o-o-d-m-a-n.

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Good morning, Mr. Goodman. My name is—

THE COURT: Forget all that. Just frame the first question. You know what my written directions are. It's not necessary to greet a witness. Just examine the **[40]** witness.

MR. S. ABADY: Yes, your Honor.

THE COURT: Jury knows his name already. Just ask the questions.

MR. S. ABADY: Yes, your Honor. I stand admonished.

Q. Mr. Goodman, you are the president for The Center For Humanities; isn't that correct?

A. Yes.

Q. And that company is also known by the name Guidance Associates?

A. Yes.

Q. You oversee the overall running of the business; isn't that correct?

A. Yes.

Q. And you are a graduate of Princeton university?

A. Yes.

Q. And after you graduated from Princeton, you worked at the McGraw Hill Publishing Company; isn't that correct?

A. Yes.

Q. You began working for The Center For Humanities in 1983 and 1984; isn't that correct?

A. Yes.

Q. This business was started in 1961 by your father; isn't that correct?

[41] A. Yes.

Q. It is a family business?

A. Yes.

Q. Okay. It's a multi-million dollars business; isn't that correct?

A. Yes.

Q. And therefore, several million shares of stock outstanding?

THE COURT: None of this matters. The question is the value of these 310 slides. Just get right to the point.

MR. S. ABADY: Okay.

Q. After you graduated from Princeton you went to Columbia Business School; isn't that correct?

A. Yes.

Q. Okay. Your business at The Center For Humanities for many, many years was making film strips for the educational market in North America; isn't that correct?

A. I was not at the company when it was making film strips.

Q. That wasn't my question, sir.

THE COURT: Don't argue with the witness. Frame the next question.

Q. You are familiar with the company's history prior to working there because it's a family business?

[42] A. Yes.

Q. You know for many years, going back to its inception, the company made film strips?

Q. It subsequently went into the video market when that technology replaced the film strips?

A. Yes.

Q. Over the years your company was a major consumer of stock photography, that is slides or negatives obtained from stock agencies, which are clearing houses or agents that represent photographers?

A. Yes.

Q. And you would purchase or lease the rights to reproduce those pictures in the products that you manufactured; isn't that correct?

A. Yes.

Q. Films and video; isn't that correct, sir?

A. The company would, yes.

Q. When I say you, I am referring to the company, okay.

Now, your company has done work for major Fortune 500 companies in this country such as Sears, General Motors, Ford, Time Magazine, Chrysler; is that correct?

A. Yes.

Q. And your company presently has about twenty employees?

A. Yes.

[43] Q. At one point you had as many as 80 employees?

A. Yes.

Q. Okay. And your employees would deal regularly with stock suppliers of photographic material; isn't that correct?

Q. Okay. And Susan Green, we heard that name mentioned by your counsel—

THE COURT: No, no, none of that. Just simple questions. Whether they heard the name mentioned has nothing to do with it. Get right to the point.

If you want to ask him what Miss Green's position in the company was, just ask him that.

MR. S. ABADY: I apologize.

THE COURT: We are wasting time with these things.

MR. S. ABADY: I am moving as fast as I can, Judge.

Q. Susan Green is a former employee of yours?
A. Yes.
Q. She was employed by you on a free-lance basis to produce a video series Conflicts in Central America; isn't that correct?
A. Yes.
Q. And Conflicts in Central America was a three-part [44] video that was developed around the slides taken by Mr. Gasperini of the wars in Central America; isn't that correct?
A. Yes.
Q. Susan Green had experience in acquiring specialized stock photography and reusing it and reproducing it; isn't that correct?
A. Yes.
Q. Susan Green had experience in acquiring specialized stock photography and revising—reproducing it; isn't that correct?
A. Yes.
Q. I will show you, Mr. Goodman, what I have marked as Plaintiff's Exhibit 1 for the record. That's the marking on the spot. It was previously marked at a deposition. Three film boxes.

THE COURT: Exhibit 1 is a letter agreement dated June 17th.

MR. S. ABADY: I am sorry. Did I say Exhibit 1? I apologize, your Honor. I lost my place.

THE COURT: What number is it that you have there? Is it ten you are talking about?

MR. S. ABADY: I am sorry, your Honor, ten.

THE COURT: Any objection to Exhibit 10?

MR. MONTBACH: No, your Honor.

THE COURT: Received in evidence.

THE CLERK: Plaintiff's Exhibit 10 is received.

MR. S. ABADY: May I approach the witness, Judge?

THE COURT: Any time it's necessary, without [45] asking.

Q. Okay. I show you what's been received in evidence as Plaintiff's Exhibit 1 and ask you if you recognize it.

THE COURT: Ten.

Q. Plaintiff's Exhibit 10.
A. Yes, I recognize it.
Q. Tell the jury what this is?
A. It's a video program about Central America.
Q. Okay. This program contains 110 of Mr. Gasperini's slides of various scenes in Central America; isn't that correct?
A. I don't know the total number.
Q. But you know it contains a substantial number of his slides, correct?
A. Yes.
Q. That's your label?
A. Yes.
Q. I'm showing for the record the videotape itself.
And these videotapes are what you marketed to the educational market in this country?
A. Yes.
Q. Now, you understand, Mr. Goodman, that when you obtain an image to reproduce to film or video you pay a reproduction fee or royalty; isn't that correct?
A. Yes.
[46] Q. What you have referred to as a rental fee; isn't that correct?
A. Yes.
Q. Your company has received thousands of such images and paid such royalty or rental fees in the past; isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Sustained. It doesn't matter. He is bound by the practice.

Q. Okay. And you are aware that a photographer owns a copyright to his or her own original image; isn't that correct, sir?

A. Yes.

Q. You did not purchase Mr. Gasperini's pictures which you then reproduced in this video, you rather gave him a licensing fee in order to produce it. The slides remain his property, isn't that correct?

A. Yes.

Q. And you kept in-house at your company a special computer, graphic equipment in order to reproduce an image, photographic image on film or video; isn't that correct?

A. No.

Q. I will remind you of an instrument that you maintain called Compugraphic. Does that refresh your recollection?

[47] THE COURT: You know, it really wouldn't matter. They lost the slides. The issue for this jury is the value of the slides at the time of the loss. Whether he has a Compugraphic machine or not is of no concern to this jury. The decision they have to make is a decision of how much money. So, let's just cut right to the main issue in the suit because Compugraphic has nothing to do with it.

MR. S. ABADY: Well—

THE COURT: Please, just get right to the value of the lost images.

MR. S. ABADY: Yes, your Honor.

Q. You have more than 10,000 of such slides that you own; isn't that correct?

A. Yes.

Q. Okay. And you have off premises many thousands more; isn't that correct?

A. Yes.

Q. Okay. You have hired photographers to take pictures for your company over the years; isn't that correct?

A. Yes.

Q. Now, you did not personally know of any policies or procedures dealing with these images; isn't that correct?

A. That's correct.

Q. There were no safety precautions in your company for dealing with these images?

[48] A. No specific safety precautions.

Q. There was no designated area where photographic material was kept?

A. No.

Q. Other than your own filing cabinets?

A. Correct.

Q. Okay. And to your knowledge, you have no written guidelines—

A. That is correct.

Q. —to safeguard photographic material?

Okay. But it is possible that a safe was used to store original photographic material; isn't that correct?

A. At some point, possibly.

Q. Okay.

THE COURT: Whether it's okay or not is for the jury to consider. Do not comment on the answers. Please direct yourself to the loss. There is no dispute, as I understand it. You can ask him straight out whether 310 slides were lost.

MR. S. ABADY: I intend to do that, your Honor.

THE COURT: Just do that. That's all you need to know from him.

MR. S. ABADY: Okay, your Honor.

As your Honor well knows, I didn't anticipate that concession in opening statement, so my preparation—

[49] THE COURT: You should've anticipated it.

MR. S. ABADY: —was to cover all our bases.

THE COURT: Did you ask him straight out?

Did your company lose 310 slides?
Would you answer that for me if he won't ask you?

THE WITNESS: Yes, we did.

THE COURT: You admit you are liable for the 310. It's just a question of what their value was at the time they were lost; isn't that right?

THE WITNESS: Yes.

THE COURT: Let's make it simple.

MR. S. ABADY: Okay, Judge. You are making it very simple. Thank you.

THE COURT: That's my job. Get moving.

Q. Okay. Now, you selected Mr. Gasperini in order to produce Plaintiff's Exhibit 10, the video film series, because he was the only person that you knew who had gone to Central America, taken the risks that he had taken, and captured the scenes and photographs that he did; isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Compound question if I ever heard

MR. S. ABADY: I will restate the question.

THE COURT: He may be asked whether he is the **[50]** person who selected this particular photographer.

Q. You have selected Mr. Gasperini because he is the only photographer you knew with his experience; isn't that correct?
A. Yes.
Q. And you believed that his slides were unique; isn't that correct?
A. No.
Q. Do you remember testifying—

THE COURT: Hand the original to the clerk.

Q. Mr. Goodman, you remember meeting me before at your attorney's office down in Wall Street on February 14th of this year?

A. Yes.
Q. Okay. And do you remember being asked the following question and giving the following answer found at page 15.

"Question: Why did you select Mr. Gasperini as opposed to some other journalist based in Central America who had taken photographs or slides of life there?

"Answer: Bill was the only person who I know had done it."

Do you remember that?
A. Yes, but that wasn't the question.
Q. Now, you realized the slides had been lost about one **[51]** month after you completed the video film series; isn't that correct?
A. Yes.
Q. And that was some time around September of 1991; isn't that correct?
A. Yes.
Q. And Susan Green, your former employee who was then employed by you on a free-lance basis, had placed the slides in your office; isn't that correct?
A. Yes.
Q. Okay. And you acknowledged that they were last seen there?
A. Yes.
Q. After that you compelled your staff to engage in a widespread search to try to locate the slides.

THE COURT: Waste of time. Waste of time.

Whether the search was widespread or not is not a matter of concern to the jury. He admits they are lost. He admits he can't find them.

MR. S. ABADY: But your Honor, he wouldn't have dedicated that kind of effort if they weren't worth that kind of money.

THE COURT: That's argument.

MR. MONTBACH: Objection, your Honor.

THE COURT: Maybe he felt embarrassed that they [52] were lost.

MR. S. ABADY: That's for the jury to determine, your Honor.

THE COURT: That's right. He made an effort to find it, didn't you?

THE WITNESS: Yes, I did.

Q. It was a substantial effort, wasn't it, Mr. Goodman?
A. Yes.
Q. It lasted for more than a year, didn't it?
A. Yes.
Q. It involved nearly all of your staff, didn't it?
A. Yes.
Q. It involved searching not only your premises but your storage premises?
A. Yes.
Q. And it also involved searching the company that you used to manufacture your videos; isn't that correct?
A. Yes.
Q. You were desperate to find these slides because of their value; isn't that correct?
A. No.
Q. But you did search for a year—
A. Yes.
Q. —in all those places?

THE COURT: Asked and answered.

[53] Q. You yourself engaged in the search even though you are president of the company.

THE COURT: None of that even though kind of stuff. That makes it an argumentative question. He may be asked whether he participated in the search.

Q. You did participate in the search?
A. Yes, I did.
Q. You in fact were in charge of the search?
A. Yes.

Q. You told your employees to look everywhere, high and low; isn't that correct?
A. Yes.
Q. You told them it's very important to find these slides?
A. Yes.
Q. You sent a memo to your employees about finding these slides; isn't that correct?
A. No. That I don't recall.
Q. It is possible though, isn't it?

THE COURT: Everything is possible around here. No more is it possible questions.

Q. Okay. You do business with a company called Cinematics*?
A. No, I do not.
Q. You never heard of that company?
[54] A. No. Cinemagnetics, is that what you mean?
Q. I may. Is it Cinemagnetics? Forgive me.
A. That's correct, yes.
Q. That's your film warehouse?
A. Yes .
Q. You also searched that company's premises as well; isn't that correct?
A. They searched it for us, yes.
Q. But at your direction?
A. Yes.
Q. Now, Mr. Goodman, you have acknowledged that you felt guilty about losing these slides because they had value; isn't that correct?
A. Yes.
Q. Now, you are aware that your company has paid for the loss of original photographic material in the past, has it not?
A. Yes.
Q. And specifically, you paid the photo stock agency Photo Researchers for the loss of some of its slides; isn't that correct?

MR. MONTBACH: Objection, your Honor.

THE COURT: Overruled.

Q. Isn't that correct?

A. I have been told about that, yes. I was not [55] personally involved.

Q. That was in 1977, wasn't it?

A. I believe so.

Q. Okay. And at the time, you made those payments based upon the industry standard; isn't that correct?

A. I don't know.

MR. MONTBACH: Objection.

THE COURT: He's answered it.

Q. Now, you do pay royalty fees from 500 to $700 for single time use for a photographic product; isn't that correct?

MR. MONTBACH: Objection, your Honor.

THE COURT: I think that has been asked and answered.

MR. S. ABADY: Forgive me, it was not. It was in the opening statement.

THE COURT: Have you paid such amounts?

THE WITNESS: Yes.

Q. And over the years your company has spent tens if not hundreds of thousands of dollars on stock photography royalty payments; isn't that correct?

A. Yes.

Q. And as a result, you have earned many millions of dollars from the more than 10,000 slides on your premises over the years; isn't that correct?

[56] A. Earned what?

Q. Hasn't your company realized revenues in the millions—

A. Yes.

Q. —from the products made from still photography?

A. Yes.

Q. Now, you know Bill Gasperini. You also know his mother, Charlotte Gasperini; isn't that correct?

A. Yes.

Q. Isn't it true that she made a number of telephone calls to you in an attempt to retrieve her son's slides?

A. Yes.

Q. Isn't it true you didn't return those telephone calls?

MR. MONTBACH: Objection. It's irrelevant.

THE COURT: Sustained. The record will show counsel started to stand.

You have to stand up to make your objection, otherwise you can be missed.

MR. MONTBACH: I am sorry.

Q. You didn't acknowledge to Mr. Gasperini or his mother right away of the loss, did you?

MR. MONTBACH: Objection.

THE COURT: I think I have to take it for the reasons stated earlier, but I think that's already been established, hasn't it?

[57] When did you first tell them they were as far as you were concerned lost?

THE WITNESS: I told his mother and Bill at different times, subsequent to the completion of the program, that we were still looking and that I was continuing to search and I was certain they would show up. It was possibly as much as a year had passed when we said we can't find them.

MR. S. ABADY: Bear with me one second, your Honor.

THE COURT: We will take a brief recess at this time. Members of the jury, don't discuss the case. Take a brief recess in the jury room.

You can step down, Mr. Goodman.

MR. S. ABADY: I will be but one minute, your Honor.

(Recess)

THE COURT: Please resume.

MR. S. ABADY: Thank you, your Honor.

BY MR. S. ABADY:

Q. Mr. Goodman, I show you what's been previously marked for identification as Plaintiff's Exhibit 1, which is a letter dated June 17, 1990, to William Gasperini from William Goodman. I will ask you if that's your signature and that's your letter?

[58] A. Yes, it is.

Q. Okay. Underneath the first page is a document of the same date called Letter of Agreement and that is a two-page document for the record.

A. Yes.

Q. It's signed by Mr. Gasperini and David Fredericks.

A. Yes.

Q. You recognize that document?

A. Yes, I do.

Q. Would you tell the jury what it is?

A. It's the basis of the relationship that we had with Mr. Gasperini on the Central America program.

Q. This is your contract with Mr. Gasperini.

A. Yes.

Q. Mr. Fredericks was employed by you.

A. Yes.

Q. In what capacity?

A. He was the Chief Financial Officer of the company.

Q. Okay. You don't dispute he had the authority—

THE COURT: Offer it in evidence. There is no objection to it.

MR. MONTBACH: Your Honor, I would like to see the cover letter. I have the other part. I just want to see—I am sure there won't be.

No objection.

[59] THE COURT: Received in evidence.

THE CLERK: Plaintiff's Exhibit 1 is received.

MR. S. ABADY: Okay. Your Honor, may I—could we have a brief side bar?

THE COURT: No. If you want to read from the document that's in evidence, you may do that.

MR. S. ABADY: Your Honor, I think you will credit me with conscientiousness. I am going to introduce in evidence—I am going to attempt to introduce into evidence an item which may draw an objection.

THE COURT: Is it on the list?

MR. S. ABADY: It's on the list.

THE COURT: Which number?

MR. S. ABADY: Number two.

THE COURT: Why didn't you tell me this when we had the recess?

Hand it to the clerk.

MR. S. ABADY: I will explain my reasons, your Honor.

MR. MONTBACH: Can I have a copy?

MR. S. ABADY: Yes, of course.

THE COURT: I will sustain the objection at this time.

MR. MONTBACH: Objection, your Honor.

MR. S. ABADY: All right. May we be heard at [60] side bar so I can explain the legal theory?

THE COURT: Not at this time. He may be asked any of the underlying facts in there. If he doesn't so testify, then you may be able to renew your offer.

Court assumes that there is an objection to it.

MR. MONTBACH: There is, your Honor.

MR. S. ABADY: Yes.

THE COURT: The objection is sustained.

He may be asked the underlying facts of the letter. If he testifies differently at trial, the letter can be shown to him. Just ask him is it true that.

Take that second paragraph out of the letter.

MR. S. ABADY: But not the third paragraph?

THE COURT: Third paragraph, all right, whatever.

MR. S. ABADY: Judge, I am being conscientious to ask your guidance before—

THE COURT: You can ask him any underlying fact but I am sustaining the objection to the letter.

Q. Okay. Mr. Goodman, I show you what has been marked—

THE COURT: He hasn't shown any lack of recollection. Just frame a simple question and ask him. Is it true that.

Q. Okay. Is it true, Mr. Goodman, the slides that were on loan to your company had been left in the editing studio on May 10th, 1992?

[61] A. I don't know that.

THE COURT: All right. Show him the letter.

Q. Is that your signature on Plaintiff's Exhibit 2?

A. Yes.

Q. And that's a letter you wrote to your representative; is that correct?

A. That's correct.

Q. And in that letter you make the statement that the slides were left in the editing studio; isn't that correct?

A. Yes.

Q. But under oath on February 14th you told me, with the presence of your counsel, that the slides were left in your office; isn't that correct?

A. Yes.

Q. Both things can't be correct; isn't that right, sir?

A. Yes.

MR. S. ABADY: Your Honor, again, in an attempt to be conscientious, I will show you—

THE COURT: No more speeches like that.

Members of the jury, side bar conferences are an awful waste of time.

The Court is sustaining an objection to this type of document unless he denies under oath any truth of the statements set forth therein.

[62] MR. S. ABADY: That's a letter to him. Some of—

THE COURT: Well, some of it says that's what—

I don't know who Mr. Dwyer is but he can be asked. What's the number of that?

MR. S. ABADY: Three, your Honor.

MR. MONTBACH: Your Honor, may I approach the bench? We are getting into an awfully touchy area now if we identify Mr. Dwyer.

THE COURT: How touchy can it be?
Step into the jury room, members of the jury.
Hand the letters to the clerk.

(Jury not present in the courtroom)

THE COURT: You could step down if you don't want to be there while this time is being wasted. You can go or stay as you wish.

MR. MONTBACH: Mr. Dwyer is an investigator for the insurance company.

THE COURT: I understand that but this is a letter which is written to Mr. Goodman, the witness; isn't that right?

MR. MONTBACH: Yes, your Honor.

THE COURT: It sets forth certain facts.

MR. MONTBACH: Yes.

THE COURT: And I suppose he can be asked as to **[63]** the underlying facts. The letter because it involves an insurance company investigation is inadmissible, because in the first place it has no evidentiary value standing alone, it's all hearsay. And secondly, it tends to be prejudicial when you bring up issues of insurance.

I just don't understand why you have this witness on there at all. He said everything he knows already.

MR. S. ABADY: Bailors have a right under New York law to bring third-party beneficiaries direct claims against the carrier.

This case could have been directly against this defendant and its insurer at the same time. I believe as a result of that that there is—the prohibition—the ordinary prohibition about introduction of insurance company documents does not apply.

THE COURT: I am adhering to my ruling. The insurance company document can be used to refresh the recollection of the witness. The underlying facts set forth therein can be brought out, but the documents themselves, I am sustaining the objection to the exhibit.

MR. MONTBACH: I was only worried about identifying Mr. Dwyer, asking that question.

THE COURT: Well, I have no idea who Mr. Dwyer is.

MR. MONTBACH: He is an insurance investigator.

[64] THE COURT: I know that but I am sustaining the objection to anything to do with the insurance company.

May I say, Mr. Abady, this is a childishly simple case. Only issue here is how much money. If you will cut directly to that, maybe the jury would be more appreciative, than dawdling around with Mr. Dwyer. Whether they were lost in his office or somebody else's office, it's clear he is liable. That's conceded. It's just a question of how much money these lost slides were worth at the time and place of the loss.

MR. S. ABADY: Your Honor, I take it under 58 (2) you would enter a directed verdict as to the issue of liability?

THE COURT: No question about that, is there?

MR. MONTBACH: We are conceding we lost the slides. We are conceding that we lost the slides. There is no doubt about that.

THE COURT: You are conceding you received the slides as bailment, are you not?

MR. MONTBACH: Yes.

THE COURT: So, that supports a judgment on the issue of liability.

MR. MONTBACH: On the issue of liability, yes.

THE COURT: Only issue to be tried to this jury is how much money the slides were worth at the time and [65] place they were lost.

MR. MONTBACH: Yes.

MR. S. ABADY: For clarity of the record, that concession is liability on all four causes of action?

MR. MONTBACH: No, your Honor.

THE COURT: No, on the bailment.
What are the others?

MR. S. ABADY: If you look at my pretrial brief, your Honor, you will see that both under contract and tort for negligence and conversion, as a matter of law that conception means that all four causes of action.

THE COURT: You are only going to the jury on the bailment. The rest are superfluous. Also, there is no basis here for punitive damages.

MR. S. ABADY: We withdraw the punitive damages claim, your Honor.

THE COURT: You are going to the jury on bailment.

MR. S. ABADY: You only get it on gratuitous bailment, not on value.

Your Honor, if I recall the witness—I will finish the question for this witness, then, if I may interrupt this testimony, we have two witnesses waiting.

THE COURT: I can interrupt his testimony right now and get them on here. We have little time left. [66] There will be

cross-examination and the Court's practice ordinarily is not to limit cross-examination to the scope of the direct as to a party witness, but of course, the attorney has a right to refrain and then recall him on the defendant's case, if that's what he wants to do.

MR. S. ABADY: We have two witnesses who are only available today.

MR. MONTBACH: Which witnesses are these?

THE COURT: Bring them in here. You knew that an hour ago. You are dawdling around with all this.
Step down, Mr. Goodman.

MR. MONTBACH: Can we know which witnesses they are?

THE COURT: We will know. I am taking him.

MR. MONTBACH: He named two witnesses.

THE COURT: Who are the witnesses?
Which one is coming first?

MR. S. ABADY: The first witness would be Robert Zentmaier. The second witness—

THE COURT: That's the extra witness which was not named?

MR. MONTBACH: I will object to that.

THE COURT: How do you justify bringing in a witness that's not named?

MR. S. ABADY: I can justify it directly, your [67] Honor. In pretrial discovery it was asked and we have sought document production for the documents that you have heard about, all of the delivery memos, all of the business records that show this company was well-aware of the industry standard. Zentmaier is on the other side of the transaction. We have had to do our own digging. We have just found him a few days ago. We have just found documents proving that they have received it.

THE COURT: You can take exception.

MR. MONTBACH: I have an exception. This is trial by ambush.

THE COURT: We are not having trial by ambush.

MR. MONTBACH: This is an expert witness they are trying to put in here.

MR. S. ABADY: He is not an expert witness.

MR. MONTBACH: This is not a named expert.

MR. S. ABADY: This is not an expert witness, your Honor.

THE COURT: I understand that.
Bring him in here. Bring him in here right away.

(Jury present in the courtroom)

THE COURT: Members of the jury, in the interest of time and also in the interest of fairness to nonparty witnesses, we are going to take a witness out of turn. We have not finished with the testimony of Mr. Goodman and he [68] will come back.

You are instructed that it makes no difference to you what order the witnesses testify in. Try to keep the testimony straight in your mind, best of your ability to do so.
Where is the witness?

MR. S. ABADY: Mr. Abady went to get him now.
I will call the other witness.
For the record, your Honor, plaintiff calls Mrs. Susan Green to the witness stand.

SUSAN GREEN having first been duly sworn, was examined and testified as follows:

THE CLERK: State your full name for the record, please, spelling your last name slowly.

THE WITNESS: Susan Green, G-r-e-e-n.

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. How old are you, Miss Green?
A. Excuse me?
Q. How old are you?
A. 52.
Q. Where do you reside?
A. 10 Old Pound Road, in Pound Ridge.
Q. Could you tell the ladies and gentlemen of the jury [69] your educational background?

THE COURT: Is it necessary?

MR. S. ABADY: It will take but a moment, your Honor. My entire examination will take no more than five minutes.

THE COURT: All right. Go ahead.

A. I have a B.A. in American history from N.Y.U. and M.A. in American history from Columbia.
Q. Okay. Are you here today pursuant to subpoena?
A. Yes.
Q. Okay. Where did you work?
A. I worked for Guidance Associates.
Q. Prior to that, did you work for any other publisher?
A. I worked for American Heritage Publishing Company and Apprentice Hall Media.
Q. In what capacity?
A. At American Heritage I ended up as associate editor and at Apprentice Hall Media I was producer and writer.
Q. How long did you work for the defendant in this action?
A. About five and a half years I think, yes.
Q. What was your job in connection with what has been received in evidence as Plaintiff's Exhibit 10, which I will show you a copy of, entitled Conflict in Central America?
[70] A. I was the—I edited the scripts that I received from Bill Gasperini and I worked on the selection of the visuals and oversaw the entire production of the program.
Q. How long did it take to produce the program?

A. I guess I worked on it less than a year. I can't—I can't really be more specific. I would say less than a year, not working on it all the time.
Q. Was Mr. Gasperini interrupted in working with you on the program?
A. What do you mean interrupted? Was he not there?
I only worked with him sporadically. I worked with him personally maybe four or five days.
Q. And the last time you worked with him, was he then shipped over to the Persian Gulf?
A. I believe that was the last time I saw him.
Q. Okay. Did you always maintain the slides—his slides at the premises of the defendant?
A. Yes.
Q. Did you ever take them outside?
A. No.
Q. You have been working in media since 1980; is that correct?
A. That's right.
Q. What was your opinion of the quality of Mr. Gasperini's work?
[71] A. I thought the pictures were wonderful.
They were very good.
Q. Was there any dissension in the company regarding that?
That is, was there anyone that had a differing opinion at The Center For Humanities regarding the quality of Mr. Gasperini's photography?
A. Not that I am aware of.

MR. S. ABADY: No further questions, your Honor.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Very brief, your Honor.

CROSS EXAMINATION

BY MR. MONTBACH:

Q. When you were working on this video, from whom did you receive the slides?

A. I believe I received them from Marilyn Young, who was the Executive Editor. She was the person to whom I reported.

Q. Okay. And in what condition did you receive those slides?

A. They were in sleeves, in standard sleeves, like I think 20 to a sleeve, and they were in a plain or manila envelope with the scripts in there.

Q. Did you receive a list of the slides?

A. No.

[72] Q. Did you receive any written description of what the slides were?

A. No.

Q. What did you do when you received the slides?

A. I kept them in my office until I needed to work with them. I reviewed them as the project got more involved. First, I edited the scripts, and after I edited the scripts, I made my selections of those slides that I wanted to use.

I went over them with Mr. Gasperini and we discussed them. And for looking at them, I would've put them in a carousel, you know, slide carousel, so we could look at them with a viewer. And they stayed in the carousel while we shot them onto video, we transferred them onto video. Once they transferred to video, I never used the slides again because video was the medium that we were working with.

Q. The three tapes that you have in front of you, are those made up solely from Mr. Gasperini's slides?

A. No, no.

Q. What else are they made up from?

A. There are some archival footage in there.

Q. Where did you obtain that?

A. Those are from materials that Guidance owned and from the National Archive, Universal news reels. The news [73] reels that Universal Pictures used to make, they were in the—they are in the public domain.

Q. Those are in the public domain?

A. Yes. The archival footage that Guidance owned we had the rights to use.

Q. Did you use any video footage from any other source?

A. I don't believe so.

I can't—I don't recollect ever—no.

Q. You say archival photographs, are these photographs or these are archival films or something like that?

A. Both. There were some films, mostly film.

Q. Mostly film?

A. The idea was to get some life action into the program so that it wouldn't be all stills.

Q. Are these films?

A. And—excuse me. It was also interspersed with an interview I did with a professor at City College.

Q. And the films that you used, were they historical films, I am saying going back before 1980, or are these during the period 1983 through 1990?

A. No. I would say most of the—90 percent that would be old. Yes, the current material were the slides.

Q. The slides.

A. But I have to say, I haven't looked at this, so—

THE COURT: You mean you have never looked at it?

[74] THE WITNESS: I haven't looked at it.

Q. Recently?

A. Recently, but I don't think there is anything new in there.

Q. Okay. And after you finished putting that together, what did you do with the slides?

A. With the slides, I had the slides in my office. I had a credenza where I kept all that material. And I think we finally finished with this project in March or April, something like that, and I put the slides in this credenza in a—I believe it was a padded manila envelope and it had Bill's name on it and I kept them there. Then, at the end of May, I was let go from Guidance Associates.

Q. May 1991?

A. Yes. But I kept my office there and I stayed on doing free-lance work till late June or July, and I would be—intermittently, I will be in and out of the office. I kept my office intact.

Somewhere I think around the end of June or the beginning of July, I am not sure exactly which, I was asked to come in and clean the office out because they needed the space. And I went in and in the course of that found this package of slides, which I gave to Will Goodman and asked him if he would give them to Bill because I knew that they had had some connection.

[75] THE COURT: What date was this?

THE WITNESS: This was probably the end of June or the beginning of July.

THE COURT: Of what year?

THE WITNESS: 1991.

THE COURT: And how many slides?

THE WITNESS: I think there were about 300. They were all in sleeves, so I would say—and there were 20 to a sleeve. Ten to 15 sleeves doesn't sound out of the ordinary. I couldn't swear that's how many there were but that's how many it seemed that there were. And I gave them—I put them in Will's office, either on a chair or a table. I am not sure which.

The office was very hectic. They were marking up a lot of things to put in storage. There was a great deal of commotion at that time just in the moving, in the consolidation of the office.

Q. The office was shrinking in size?

A. Yes. I believe that half the floor was being given up, so there was a lot of commotion and a lot to do.

Q. That's the last you saw those slides?

A. That's the last I saw the slides.

MR. MONTBACH: Thank you. No further questions.

THE COURT: Any redirect?

MR. S. ABADY: Very briefly, your Honor.

[76] REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Bill was listed as the photojournalist in the film series; is that correct?

A. I believe so, yes.

Q. Okay. And none of the archival material, that is the film footage as opposed to Bill's still shots, depicted the same images as the images in Bill's photographs?

A. To the best of my recollection, no.

MR. S. ABADY: Thank you very kindly.
No further questions.

THE COURT: Finished with the witness?

MR. MONTBACH: Yes, your Honor.

MR. S. ABADY: I did, your Honor.

THE COURT: Thank you, Miss Green. You are excused.

THE WITNESS: Okay.

ROBERT ZENTMAIER having first been duly sworn, was examined and testified as follows:

THE COURT: State your name and spell your last name for the record.

THE WITNESS: My name is Robert Zentmaier. That is spelled Z-E-N-T-M-A-I-E-R.

DIRECT EXAMINATION

[77] MR. J. ABADY:

THE COURT: Go right ahead.

MR. J. ABADY: Thank you, Judge.

Q. Mr. Zentmaier, are you presently employed?
A. Yes, I am.
Q. Where are you employed?
A. I am employed at Photo Researchers in Manhattan.

Q. What is your position with Photo Researchers?
A. I am president.
Q. How long have you worked for Photo Researchers?
A. I have been there since 1968.
Q. How long has Photo Researchers been in business?
A. The company was started in 1957.
Q. Would you explain to the members of the jury what type of business Photo Researchers is?
A. It's a stock photography agency. We represent photographers. We maintain a file of their photographs and we sell the reproduction rights to various commercial buyers, editorial buyers and advertising buyers.
Q. Mr. Zentmaier, where do you—withdrawn.
Mr. Zentmaier, how many images does Photo Researchers have?
A. We have about a million.
Q. And where do you keep those images?
A. We keep them in our offices on 56th Street in [78] Manhattan.
Q. How many professional photographers do you presently represent?
A. We represent around 250 active photographers, plus we hold the works of another 15 to 1700 photographers where either they are deceased or they had some few images that we felt we needed to round out the files, to fill gaps in the files.
Q. Do you maintain photographs of photographers who are deceased?
A. Yes, we do. We find that the sales potential of a photograph does not diminish with the death of the photographer. In fact, we have some photographers whose work has actually increased in the sales potential. There is one gentleman—

THE COURT: I don't think we need to get into that. Just get right to the point.

MR. J. ABADY: Judge, I think it might be an issue.

THE COURT: We are not concerned with a dead photographer. Can't we stick to the case? Can't we get right to the point?

MR. S. ABADY: Goes to the issue of valuation, your Honor.

THE COURT: Please proceed.

[79] Q. Is it common industry practice to maintain the photographs of a photographer for a long period of time?

MR. MONTBACH: Objection.

THE COURT: Sustained, relevance.

MR. S. ABADY: Can we have a side bar, your Honor?

THE COURT: No. Side bar conferences delay the trial.

Q. Mr. Zentmaier, can you tell the members of the jury how many competitor stock agencies there are?
A. There are approximately 80 significant agencies in the country.
Q. And can you explain your responsibilities as president of Photo Researchers?
A. I administer all aspects of the company.
Q. And what is the relative size of Photo Researchers compared to other stock agencies?
A. We are one of the largest in the editorial area, selling the textbooks, encyclopedias.
There is an advertising—one which specializes in advertising sales that are larger than we are but we are, I would say, in the top ten percent.
Q. Mr. Zentmaier, I am showing you now what's been marked as Plaintiff's Exhibit 27. I ask you to take a look at that.

[80] MR. J. ABADY: There is only one copy.

A. It is the package directory of photo agencies. It's a trade organization that agencies belong to if they meet certain requirements in size and ethical responsibility.
Q. Does that list all of the various stock agencies that you referred to earlier?
A. Yes.
Q. And are you familiar with that?
A. Yes, I am. I might have been off on the quantity. I think there is around 80.

Q. Is that book used in the industry to list the various stock houses that hold still photography?

A. Yes.

MR. MONTBACH: Objection.

THE COURT: I will let his answer stand. The book has not been offered.

A. Yes.

MR. J. ABADY: Judge, at this time, I would move Plaintiff's 27 into evidence.

MR. MONTBACH: I object, your Honor.

THE COURT: Sustained, at least at the present. The Court will discuss its ruling later with counsel.

MR. S. ABADY: Very well, Judge.

Q. As president of one of the larger stock houses in the country, are you familiar with the industry practice?

[81] A. Yes.

MR. MONTBACH: Objection. What practice?

THE COURT: Well, you will soon learn if you will wait.

Q. Are you familiar with the industry—

THE COURT: Is there a practice is the question. Is there a practice concerning—

A. There are standard operating procedures.

Q. And those govern the stock photography industry; is that correct?

A. Yes.

Q. The selling and licensing of slide transparencies and images?

A. Yes.

Q. And do you have knowledge of the practice of other stock agencies?

A. I know how some of them operate through meetings, et cetera.

Q. How many different companies, publishers, film companies, agencies, book authors does Photo Researchers deal with in a year?

A. Over a thousand.

Q. And what type of companies do you sell your images to?

A. Well, textbook publishers, encyclopedia publishers, magazines, ad agencies, corporate buyers directly.

[82] Q. Do you have occasion to sell still photography and still images to the computer industry?

A. Yes, more and more with the advent of the CD Rom and other technology.

Q. Can you explain to the members of the jury how still photography is used in that particular technology?

MR. MONTBACH: Objection.

THE COURT: Sustained. It doesn't matter. The jurors can use their common sense that still photography can be used in CD Rom.

Q. Mr. Zentmaier, have you ever met William Gasperini?

A. No.

Q. Are you familiar with his work?

A. No, I'm not.

Q. I want to talk to you a little bit about the fees.

THE COURT: No, no. No introductory comments. Just frame a question.

Q. What's the range of fees that can be earned by selling an image for one time use?

MR. MONTBACH: Objection.

A. Depends how it's being used. Could be anywhere from a little over a hundred dollars for an editorial fee to many thousands of dollars for an advertising use.

We are currently negotiating a fee that will be over $30,000 for use of photograph advertisement.

[83] MR. MONTBACH: Objection. Move to strike.

THE COURT: I will let it stand. However, don't volunteer information.

THE WITNESS: Yes, sir.

Q. What does this range depend on?

A. Exposure.

Q. When you say exposure, what do you mean?

A. If it's used in a textbook, a typical high school textbook, a quarter page or less might be $160. If it's larger, it would be more expensive. If it's the cover would be more still. If it's promotional use, it's more than that. Promotional uses are negotiated individually.

Q. Is it uncommon for a slide transparency to sell for several thousand dollars for one time use?

MR. MONTBACH: Excuse me, would you repeat the question?

THE COURT: Asked and answered.

MR. J. ABADY: I withdraw the question, Judge.

Q. You mentioned—

THE COURT: Whatever he mentioned the jury heard. We don't allow that type of questioning. It's repetitious on its own.

MR. J. ABADY: I apologize, Judge.

THE COURT: Just simple questions.

MR. J. ABADY: Yes, Judge.

[84] Q. How are the million slides that you have in your premises catalogued?

A. They are filed by subject.

Q. And how many subjects are there and what would some of the examples of those subjects be?

A. There would be thousands of subjects. They are filed—we have a natural history area to be filed by the animal species. We have the science area. They will be filed by the

scientific subject. We have files of people, places and things. They will be filed by location perhaps or by industry.

Q. Mr. Zentmaier, do you file slide transparencies by photographer?

A. No, we don't.

Q. Why is that?

A. Because the requests don't come in that way. They come in, they want a specific subject. They don't really care who took the image.

Q. How long do you keep images in stock?

A. It would depend on the image. If it's an image showing for instance the street seen, it might outdate itself after four or five years because the fashion changes or cars getting outdated or buildings coming down.

If it's a nature photo, we might hold it for many years as long as the film stock is viable.

[85] We have historic photos also which come up, you know, indefinitely.

Q. And could you tell the members of the jury the type of value that historical photos and still photography has when it has historical content?

A. Well, anytime anything happens that's relevant to the event, like pictures of John Kennedy, the anniversary of his death, are still in demand. When Jackie recently died there was demands on the Kennedy collection of images.

Q. So, there is a recurrent or cyclical use of those images?

A. Yes, there is.

Q. Is that true of historical photographs?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. It can be. It depends on the subject.

Q. And is that—when we say does it have cyclical value, can you explain to the jury what we mean by that?

A. Like the anniversary of D-Day, we suddenly had demands for the photographs of D-Day which had been sitting in the files for ten years with very little interest.

Q. That means you would be requested to supply that image repeatedly?

A. Yes, yes.

Q. You will sell it repeatedly?

[86] A. We will sell the same image repeatedly.

Q. Is repeated use something that's common in the industry practice?

A. Yes. We sell one time non-exclusive rights in most cases.

Q. How long might a slide or a still photograph sit dormant before it is used?

MR. MONTBACH: Objection, your Honor.

THE COURT: If he can answer it.

A. Well, there is no specific answer. We have had some—

THE COURT: If you can't answer it, just tell him you can't answer.

MR. J. ABADY: I would like the complete answer because I think this is important.

THE COURT: No. Frame the next question.

Q. Is it typical that a slide could remain in your files for five or ten years without use and then suddenly enjoy a very active use?

MR. MONTBACH: Objection.

THE COURT: If he understands the question, he can answer it.

A. Every day we sell images that have been in the files for many years, not sold before. I don't define that as active but they will sell after many years, yes.

[87] Q. Does the prior sales history of a photographer affect the price at which an image or a fee is generated?

A. Not with Photo Researchers.

Q. And is that true also of other stock agencies in the industry?

MR. MONTBACH: Objection.

Q. If you know.

THE COURT: If he knows.

A. With most of them that's true. There are certain photographers of great note, whose work is priced higher.

Q. But that represents a minority of the industry?

A. Very much so.

Q. Does the prior sales history of a particular image bear any relationship to the frequency with which an image might sell in repeated sales?

MR. MONTBACH: Same objection, your Honor.

THE COURT: If he knows.

A. It does. The photo that sold many times before tends to sell again.

Q. And if an image is difficult to obtain or taken under difficult conditions, does that affect the value of the slide?

MR. MONTBACH: Objection.

THE COURT: Again, if the witness understands the question.

[88] MR. MONTBACH: It's a compound question, your Honor.

THE COURT: Subject to cross-examination.

MR. MONTBACH: It's a compound question, your Honor.

THE COURT: It is a little compound.

MR. J. ABADY: I will withdraw the question and rephrase it.

THE COURT: Also, keep out the qualitative words.

MR. J. ABADY: Yes, Judge.

Q. If an image is taken under difficult circumstances, that is it is difficult to recreate, does that affect the value that the image will bear on the market?

MR. MONTBACH: Objection.

THE COURT: If he understands the question, he can answer.

A. In editorial sales the answer is no.

In advertising sales the person negotiating the price will take that into consideration and try to get some more money for it.

Q. Mr. Zentmaier, what type of paperwork is generated by your company and other stock agencies when a slide is sent out from the premises?

A. Every photo that leaves the files is accompanied with what we call a delivery memo.

[89] Q. Can you explain to the members of the jury what a delivery memo is?

A. It states who the slides are going to, briefly what the subject matter is, and the numbers that the agency has assigned to the photo. That's on the front. And on the reverse there is some terminology explaining how they are supposed to be used, copyright restrictions, loss and damage.

Q. Are there standard terms and conditions printed on the back of every delivery memo?

A. Yes.

Q. Is one of the standard terms and conditions—does one of the terms and conditions concern liability?

MR. MONTBACH: Objection, your Honor.

THE COURT: Sustained on the best evidence rule.

Q. Mr. Zentmaier, I am showing you what's been marked as Plaintiff's 13 in evidence and ask you to take a look at it and tell me if you recognize it.

MR. MONTBACH: It has not been marked in evidence.

Q. I ask you to take a look at that and tell the Court and members of the jury if you recognize it.

A. This is a Photo Researchers delivery memo.

Q. Is that a delivery memo from your company?

A. Yes.

[90] Q. And is that kept in the regular course of your business practice?

A. Yes, it is.

Q. And does that have standard terms and conditions printed on the reverse side?

A. Yes, it does.

Q. Does one of the standard terms and conditions concern liability?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Does that document contain—

THE COURT: Are you offering the document?

MR. J. ABADY: Yes, Judge, I am offering the document.

THE COURT: All right.

MR. MONTBACH: Objection.

THE COURT: I am afraid I will have to hear the objection. Can I see the document?

(Jury not present in the courtroom)

THE COURT: It's being offered, as I understand, solely to prove the existence of this claimed practice. And I suppose that it can be received for that purpose but the Court would have to tell the jury that's all it's received for and that there was no such memorandum used in connection with the transaction in this case.

[91] MR. MONTBACH: It has nothing to do with this

THE COURT: It shows—it may show—

MR. MONTBACH: Photo Researchers does this. That's all. They had nothing to do with this case.

THE COURT: It may show that such a practice exists in the industry.

MR. MONTBACH: It shows that Photo Researchers had terms on their document.

THE COURT: That's all it shows. I think I will receive it for that limited purpose.

MR. MONTBACH: Exception, your Honor.

MR. J. ABADY: Your Honor, for the record, we can lay additional foundation. That document has been sent repeatedly to this defendant.

MR. MONTBACH: Not in this case.

THE COURT: I know not in this case but that can be proved.

(Jury present in the courtroom)

THE COURT: Members of the jury, this particular document is received for a very limited purpose; namely, for whatever consideration you think proper as to whether some disputed industry practice actually exists.

You ought to understand that this memo or a delivery memo of this sort was not used in this existing **[92]** transaction that's being sued on here today. It's only to show you whether there is such a practice in the industry and for whatever consideration that may bear on the case. The Court will instruct you as to these disputed matters at the end of the trial.

You can read that clause from it, then move on to something else.

Q. Would you please read—

THE COURT: No, you read it. Attorneys read from documents which are in evidence.

MR. J. ABADY: I am reading now under the section marked terms of delivery of goods.

Item number four, document states, "The monetary damage for loss or damage of original color transparency or photograph shall be determined by the value of each individual photograph. Recipient agrees, however, that the reasonable

minimum value of such lost or damaged photograph or transparency shall be no less than $1,500.

"Photo Researchers agrees to the delivery of the goods herein only upon the express covenant and understandings by the recipient that the terms contained in this photographer are material to this agreement. Recipient receives full liability for its employees, agents, assignees, messengers, and for misuse of the photographs."

[93] Q. Are those the terms contained in that document?

A. Yes, it is.

Q. Does that specific language appear a second time in the same memo?

A. It's for the conditions of use also.

Q. So, the same language appears twice?

A. Yes.

Q. If you know, is that term standard in the industry practice?

MR. MONTBACH: Objection.

THE COURT: If he knows.

A. Other photo agencies use very similar terminology.

Q. Do they all contain the industry standard of $1,500, if you know?

MR. MONTBACH: Objection.

THE COURT: Sustained as to the form of the question. He may be asked whether he has any knowledge as to what numbers other agencies used.

A. There are some that use a different figure.

Q. What would that different figure be?

A. $2,000.

Q. Do you know of any stock agency that transmits and delivers still photography, specifically slide transparency, that does not use a delivery memo?

A. No, I don't.

[94] Q. Do you know of any stock agency that uses a delivery memo that does not include the type of term that you just described?

A. No, I don't.

Q. Mr. Zentmaier, has Photo Researchers done business with Guidance Associates or The Center For Humanities?

A. Yes, it has.

Q. What type of business have you done with the defendant corporation?

A. We have leased them reproduction rights to photographs.

Q. When did you first begin dealing with Guidance Associates, the Center For Humanities, the defendant in this action?

A. In the mid-'70s some time. I don't know exactly the date.

Q. Did you do business with them in the 1980s?

A. Yes.

Q. Did you continue to do business with them in the 1990s?

A. Yes.

Q. Has Guidance—has the defendant ever lost slide transparencies that you provided them with?

A. There was a loss many years ago, back in the '70s.

Q. I would like to show you now what's been marked 12-A, [95] Plaintiff's 12-A.

MR. MONTBACH: May I have a copy?

MR. J. ABADY: Yes.

MR. S. ABADY: Your Honor, may we move on?

THE COURT: Don't wait for me. I thought he was looking at the document.

MR. J. ABADY: I was looking for a copy, Judge. I will try to locate that.

Q. Do you recognize that document?

A. Yes, I do.

Q. Can you tell the members of the jury what it is?

A. Well, it's the invoice that we sent back in October 1977 for the loss of 7—7 images.

Q. Who was—who lost the images?

A. Well, it was sent to The Center For Humanities.

Q. Is that the same center that's defendant in this action, if you know?

A. To the best of my knowledge.

Q. And were you compensated—the invoice that you have there, does that have the same terms and conditions as your delivery memo that you just described?

A. Maybe substantially the same. This was 1977, so they get modified periodically.

Q. Does it have the same industry standard of $1,500 written on the back?

[96] A. Yes, it does.

Q. Can you tell the members of the jury how much the defendant paid for those slides at that time?

A. For four of them they paid $750 each and for three additional ones they paid $1,500 total, so $500 each.

Q. And can you tell the members of the jury what types of photos they were?

A. Very generic kind of things. They are described as signs over lunchroom, cafeteria, PTA room.

Q. That payment was made more than 15 years ago?

A. Yes.

Q. In addition to losing transparencies, has the defendant ever purchased transparencies, slide images from your company?

A. Yes, they have.

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Well, have you ever done—have you done additional business since that loss occurred with the defendant?

A. Yes, we have.

THE COURT: As I understand it, that 1977 loss was not paid in accordance with the memorandum received; is that right?

THE WITNESS: That is correct.

Q. Well, when you say in accordance with the memorandum [97] received, was the money paid negotiated from the industry standard which appears on the back?

MR. MONTBACH: Objection.

THE COURT: I don't know if he remembers but it looks to me as if the amount on the receipt and the amount paid are different; is that right?

THE WITNESS: Yes, that's right.

THE COURT: All right.

THE WITNESS: The amount on the terms of delivery are different from what they paid, yes.

THE COURT: All right.

Q. How is that kind of loss typically negotiated, with what reference point?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Following that transaction and loss, did your company do business subsequently with the defendant?

A. Yes.

Q. And I am showing you now what's marked Plaintiff's 12-B and C in evidence, ask you to take a look at that, see if you recognize it.

A. Yes, I do.

Q. And can you tell the members of the jury what that is?

A. Well, they are computer-generated reports showing submissions that were made to the center in 1986.

[98] MR. J. ABADY: I would offer them into evidence at this time, Judge.

MR. MONTBACH: For what?

THE COURT: Hand it to the clerk.

MR. MONTBACH: Your Honor, I am not sure what he is offering in evidence.

THE COURT: I am not either. That's why I have asked him to hand it to the clerk.

MR. MONTBACH: They are not on the exhibit list and I don't have a copy of it, your Honor.

THE COURT: Show them to counsel. As far as I am concerned, I think I would sustain the objection.

MR. MONTBACH: I make the objection, your Honor.

THE COURT: He has answered he did do business since 1977.

Q. Showing you what's been marked now Plaintiff's 12-D in evidence, ask you to take a look at that.

MR. MONTBACH: Objection, your Honor. He keeps saying in evidence. These aren't in evidence.

THE COURT: Well, I have sustained the objection to these documents on the grounds of relevance.

MR. MONTBACH: This is a new one. He keeps saying it's in evidence.

THE COURT: Hand it to the clerk. Is it on the exhibit list?

[99] MR. J. ABADY: I believe it is, your Honor.

MR. MONTBACH: No.

MR. S. ABADY: Exhibit 12 says invoice and correspondence from Photo Researchers for The Center for Humanities, dated February 2, '77 and October 31, '77. We have simply for—

MR. MONTBACH: Which is 12-A?

MR. S. ABADY: —for ease of reference for the jury separately identified the correspondence and the invoice.

THE COURT: I think he has already—well, I suppose this may be admissible.

MR. MONTBACH: Your Honor, that's 12-A. I haven't seen that. I don't know what 12-D is.

THE COURT: Please take a look at it. I am looking at 12-D. I would like everything to be in accordance with the number. It will be received soleiy for the fact of the transaction, that's all.

MR. MONTBACH: Your Honor, this is a 1986 document.

THE COURT: I understand that. That goes to the weight. Objection is overruled. Received in evidence. Please move along.

THE CLERK: Plaintiff's Exhibit 12-D is received.

Q. Mr. Zentmaier, can you tell the members of the jury **[100]** what that document is?

THE COURT: No, no. It speaks for itself. Go on to something else. It shows they had a transaction.

Q. I would like to show you now what's been marked Plaintiff's 12-C and 12-F for identification purposes.

MR. MONTBACH: 12-E and F?

MR. J. ABADY: C and F.

MR. MONTBACH: C has already been denied.

MR. J. ABADY: I'm sorry. It's 12-E. I misread it.

Q. Ask you if you recognize those documents?
A. Yes, I do.
Q. Are those business records from your company?
A. Yes, they are.

Q. Are there check stubs attached to those documents?
A. Yes, they are.
Q. Who are those check stubs from?
A. Well, they are from the center. A variety of companies are listed including the center and I guess other affiliates.
Q. That's the defendant in this case?
A. Yes.
Q. And it is located on that document industry standard of $1,500?

[101] A. That is correct.
Q. Is that located in the same place on each of those documents?
A. Yes, it is.
Q. I would like to show you now what's been marked 12-G and H for identification.

MR. MONTBACH: Your Honor, I am going to renew this objection. We have had number 12 on the exhibit list. I have not been given copies of any of these things. Two documents dated February 2nd and October 21st of 1977.

THE COURT: I have not seen these documents either. Please hand them to the clerk.

MR. J. ABADY: Judge, I had copies made but I am having difficulty locating them. I will get them to counsel.

THE COURT: That may well be true but unless the attorney can see them, we can't form a conclusion.

I think I have to suspend at this time with the witness. You have to return Wednesday morning at 9:30, is that right? 9:45.

THE WITNESS: Okay.

THE COURT: You can step down.

Members of the jury, thank you for your attendance. You are excused for the balance of the day. Keep an open mind and don't discuss the case. Please **[102]** return 9:45 Monday morning. Tuesday you are not on jury duty, 80 you have to go

about the regular affairs of your life. If you have to work, you have to go to your job.

Thank you very much. You can withdraw from the courtroom.

(Jury not present in the courtroom)

THE COURT: Copies of these have to be found and furnished to the attorney.

MR. S. ABADY: We will do it forthwith, your Honor.

THE COURT: Wait until the jury leaves.

There is a problem with this because there is no receipt in this particular case and the Court took the position earlier which is still my position, that the existence of such a practice may be some evidence as to value but it's certainly not binding. And the rule of law in the case as stated earlier is the market value of the goods at the time of their destruction or loss.

Now we have testimony from this witness called by the plaintiff that on the occasion when this did arise, the consignee, which is the defendant in an unrelated matter, didn't pay the full amount. So, where is it all going? It seems to me it's kind of a useless exercise. They have it in their bill of lading but they don't enforce it.

[103] MR. S. ABADY: Judge, if I may respond. These documents prove two things. One, they prove the ongoing relationship with the stock agency as to its dealings with the industry standard. Two—

THE COURT: He doesn't pay.

MR. S. ABADY: There is no such delivery memo in this case because Mr. Gasperini would not have had occasion to do so, in that, he physically took the slide material there because he worked on the premises as an editor.

THE COURT: Then the whole thing—

MR. S. ABADY: These are clearing houses for the photographers they represent. Mr. Gasperini delivered his own documents.

THE COURT: But he doesn't have the document.

MR. S. ABADY: His own slides, I misspoke.

THE COURT: On these slides he doesn't have the document and the evidence is that even when slides were lost, this alleged industry standard was honored in a breach.

MR. S. ABADY: No, your Honor. In fact—

THE COURT: That's the testimony.

MR. S. ABADY: He stated an objection to the line of questioning Mr. Abady tried to elicit from the witness, which was that the industry standard is always the point [104] of reference for negotiation because—

THE COURT: Then it's useless, isn't it?

MR. S. ABADY: Because of the costs involved in seeking legal remedies in court.

THE COURT: If it's not industry practice, it's not industry practice unless the people in the industry follow it, and the evidence here affirmatively brought out by the proponent is on the one occasion when it occurred, they didn't follow it.

MR. J. ABADY: Judge, may I be heard very briefly?

THE COURT: Very briefly.

MR. J. ABADY: There are a number of issues in contest here. One of the issues is whether an industry standard exists. The defendant is taking the position that no such industry standard exists and they did not know about it.

THE COURT: Well, they knew about it, so that much you have proved. But to the degree that it's enforced, it's somewhat doubtful in light of the testimony of this witness.

MR. J. ABADY: Well, the first document that we introduced—Judge, there will be additional testimony from another witness later in the case about that specific document and how the negotiation took place and what role **[105]** the industry standard played in it.

THE COURT: I am letting you do it. I made my rulings. I think you ought to forget it and go to the issue of market value of these slides because all of this is a big tumult over nothing, where you may have failure of proof that the market standard exists or it's enforced and it creates a possible source of error.

Now, I am adhering to my rulings but I think I have to tell you that once he tells you or once he tells the jury, "oh, yeah, we had a loss in 1977, they didn't pay the figure that's the market standard," then the market standard loses a lot of its vitality.

MR. S. ABADY: Well, your Honor, another matter—housekeeping matter so that you will not be delayed and taking care of your other business, defense counsel has handed to Mr. Gasperini this morning a subpoena duces tecum, which requires that he bring basically all of his photographs to court.

THE COURT: All right. That's quashed.

MR. MONTBACH: Your Honor—

THE COURT: Yes. That's absurd. You had plenty of pretrial discovery in this case. You had all the opportunities in the world to have your expert look at his other photographs.

MR. MONTBACH: Two things, your Honor.

[106] MR. S. ABADY: His expert did look at all of the photographs in my office.

MR. MONTBACH: Please Mr. Abady—

THE COURT: Please let him finish.

MR. MONTBACH: We subpoenaed—not today. We subpoenaed them through his attorney over two weeks ago when we were going to start this. Subpoena through his office.

THE COURT: How many photographs are involved?

MR. MONTBACH: He says 5,000.

THE COURT: I am not having 5,000 photographs—

MR. MONTBACH: He carries them.

THE COURT: —schlepped into this courtroom on a very simple case which two experienced lawyers are trying to make into a big deal. I am not having it.

Now, if there is a reasonable number of photographs which your expert looked at pretrial and wants to testify that this is a sample, it's no good, that you are free to do, but I am not having a subpoena for 5,000 photographs to be carried into this courtroom. That's absurd.

MR. MONTBACH: Your Honor, they can be carried in this box right here.

MR. S. ABADY: Eight of those boxes.

MR. MONTBACH: No. There were two of them when **[107]** you showed them to me in your office.

THE COURT: Where were the exhibits that the expert for the defendant saw?

MR. MONTBACH: Counsel's office.

THE COURT: Bring those in. They can look at what he looked at pretrial.

MR. MONTBACH: Also, the condition they were in when we looked at them.

MR. S. ABADY: We couldn't possibly do that.

MR. MONTBACH: We would like them in the condition we looked—

THE COURT: Lots of things I would like, I can't have them. They will be brought. You are not to intentionally mess them up.

MR. S. ABADY: Judge, let me speak to this issue. When his expert looked at these photographs, they were organized in stacks of plastic boxes which are used. They have since been mounted in mounted sleeves in three-ring binders, which is a second common way to bind them. We don't have the boxes anymore even though he subpoenaed them.

THE COURT: The ones that he was shown. The slides that he was shown must be produced.

MR. S. ABADY: Those are all of them.

MR. MONTBACH: We have subpoenaed the containers, [108] the bag they were in, to show how the plaintiff treated his own pictures.

MR. S. ABADY: They were in the normal manner.

THE COURT: One at a time. Look, both of you are treading on the time wasting threshold with me.

This is such a childishly simple case. If you can't settle it, I understand, but you certainly can try it. And I haven't heard a single word this morning which would help a juror put a price on these slides, not a word.

Now, sooner or later they are going to detect that this is going on and you will lose their interest.

MR. S. ABADY: I hear you, Judge.

MR. MONTBACH: Your Honor—

THE COURT: I am ordering that the slides which were produced pretrial shall be brought to court on Wednesday morning.

MR. MONTBACH: Your Honor, may I speak on this issue of how they were contained? Your Honor said last time we were here how the plaintiff treats his slides is indicative of the value he places on them.

THE COURT: It's some evidence.

MR. MONTBACH: I think we are entitled to show the jury that.

THE COURT: You can do that by direct testimony [109] or cross-examination.

MR. S. ABADY: We welcome it.

MR. MONTBACH: We would like them to bring the shoe boxes in here.

THE COURT: We are having brought in everything that the defendant expert saw pretrial and the subpoena is modified accordingly.

MR. S. ABADY: Judge, we don't have the other containers. We have new containers. It was done months ago.

THE COURT: Well, you bring what you have. Nobody can do the impossible. Your client may have to explain.

MR. S. ABADY: He will be glad to, your Honor. Number three on the duces tecum subpoena is all typewritten electronically stored records that relate to the transaction between plaintiff and defendant. All that has been produced. There are no additional records.

THE COURT: Bring it in.

MR. MONTBACH: Bring the originals.

MR. S. ABADY: We don't have electronically stored records.

THE COURT: Tell him you don't have it.

MR. S. ABADY: That's the point. We have already addressed number four, which has to—had to do with [110] packing materials which were in fact slide boxes, maxon* slide box.

MR. MONTBACH: The fruit boxes.

MR. S. ABADY: There were no fruit boxes.

THE COURT: Wait a minute. Both of you are treading on my patience. This is getting frivolous. You seem to want to saw the wind and reap the whirlwind from this jury.

I have not seen in a long time two people, each trying so hard to make something which is simple complex. Don't do it. You will get the dividends from them. If they decide you are obfuscating or exaggerating, they are going to take it out on your clients. And I run an honest roulette wheel. If you get a bad verdict, I am letting it stand. That's a warning to both of you.

MR. MONTBACH: I will show you where I wrote down the label on the fruit boxes.

THE COURT: That can be testimony. The fact they were in fruit boxes is some evidence. It's not probative.

MR. S. ABADY: They were in green plastic maxson* slide boxes, which you yourself have seen at the drug store. When they were brought into my office, they were put in the boxes. The slides were never loose in a fruit box as he suggests, ever.

THE COURT: That's a disputed issue of fact; **[111]** meaningless one but probably admissible.

I will see you all Wednesday morning.

(Case adjourned)

[151]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

93 Civ. 7204 CLB

WILLIAM GASPERINI,

Plaintiff,

v.

THE CENTER FOR HUMANITIES, INC
d/b/a GUIDANCE ASSOCIATES,

Defendant.

June 29, 1994 9:50 a.m.

Before:

HON. CHARLES L. BRIEANT,
District Judge.

APPEARANCES

RUBIN, KALNICK & BAILIN
Attorney for Plaintiff
SAMUEL A. ABADY
JONATHAN S. ABADY

BIGHAM ENGLAR JONES & HOUSTON
Attorney for Defendant
FRANCIS A. MONTBACH

MARTINDALE & BRZYTWA
Attorney for Defendant
KEVIN H. YOUNG

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[152] (Jury present)

THE COURT: Good morning, members of the jury. Will the witness please return to the stand.

ROBERT ZENTMAIER, resumed.

THE CLERK: Mr. Zentmaier, the court reminds you that you've previously been sworn.

THE COURT: Please resume.

MR. MONTBACH: May we approach the bench, your

THE COURT: All right.

(Discussion off the record)

THE COURT: Let's move along. No more side bar conferences.

DIRECT EXAMINATION (continued)

BY MR. J. ABADY:

Q. Mr. Zentmaier, I'm showing you what's been marked Plaintiff's Exhibit 12A in evidence. Do you recognize that?
A. Yes, I do.
Q. Can you say what that is?
A. It's the invoice for the loss of photographs from 1977.

MR. J. ABADY: Judge, at this time I'd move that into evidence.

MR. MONTBACH: I have no objection, your Honor.

THE COURT: Received without objection.

[153] (Plaintiff's Exhibit 12A for identification was received in evidence)

Q. And does that concern the loss in 1977 of seven transparencies—

THE COURT: It speaks for itself. It's in evidence.

Q. Showing you now what's been marked Plaintiff's Exhibit 12H for identification. I ask you if you recognize that.
A. Yes, it's a delivery memo for photos that we submitted to Guidance Associates in May of 1993.
Q. Is that your business record?
A. Yes, it is.

MR. J. ABADY: At this time I'd move that document into evidence.

MR. MONTBACH: Objection.

THE COURT: I think it's cumulative. We already had one of these.

MR. MONTBACH: It's in 1993, your Honor.

THE COURT: After the case started, sustained.

MR. J. ABADY: The difference between this and the previous exhibit is that this shows a particular transaction with the defendant corporation.

THE COURT: I understand. But it's after this lawsuit as I understand it.

[154] MR. J. ABADY: I still think that that's relevant to the issues in the lawsuit.

THE COURT: We'll discuss it at the next recess. For the present I'm sustaining the objection.

Q. Mr. Zentmaier, is it industry practice and practice of Photo Researchers to have people who are going to receive

and use slide transparencies sometimes pick up the transparencies from your premises?

MR. MONTBACH: Objection.

THE COURT: Is it to the form of the question?

MR. MONTBACH: The form, the relevance.

THE COURT: I think the relevance may be all right. Reframe the question.

Q. Mr. Zentmaier, to your knowledge have employees of the Center for Humanities been on your premises to pick up slide transparencies?

A. Yes, they have.

Q. And when they pick up slide transparencies on your premises are they required to sign something?

A. Yes, they are.

Q. And what are they required to sign?

A. A copy of the delivery memo.

Q. And on the delivery memo is the industry standard of $1500 printed on the form?

MR. MONTBACH Objection.

[155] THE COURT: I thought we already had this.

Q. What is the purpose of signing the delivery memo?

MR. MONTBACH: Objection.

THE COURT: I think I've taken this already. If I've not taken it already I'll let him answer. It's understood that there's no delivery memo in this case.

MR. J. ABADY: No, Judge. But I do think that there's a question—

THE COURT: I'll let him answer the question.

A. Would you rephrase the question or repeat it, please?

Q. The question is: What is the purpose of having someone sign the delivery memo on your premises prior to taking slide transparencies off the premises?

A. Well, it's to prove receipt and to bind them to the terms of the delivery.

Q. And one of the terms of the delivery is the industry standard of $1500, is that correct?

MR. MONTBACH: Objection.

THE COURT: Well, I think he's already told us that, hasn't he. I'll let him answer.

A. Yes, it is.

MR. J. ABADY: I have nothing further, Judge, with the exception of the issues I'd like to discuss at side bar.

[156] THE COURT: The only issue I know we have left open is 12H.

MR. J. ABADY: There's several other exhibits that I think relate to the same issue.

THE COURT: Before the witness goes we'll take a recess. If you wish to cross-examine him based on what's been done so far please do.

MR. MONTBACH: Yes, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Zentmaier, when you were being questioned on Monday concerning your industry and the amount of money which your company charged for the use of various types of photograph slides, you mentioned the term "editorial use."

A. Yes.

Q. What does that mean?

A. Well, we define it as being textbook, encyclopedia, magazine, anything where a product is not being promoted. So if somebody is using it to advertise a piece of furniture and they have this in the background, that is an advertising use. If it's in a textbook, it's editorial use.

Q. In a magazine, a newspaper, a periodical?

A. If it's not part of an advertisement, it would be editorial.

[157] Q. And is the $160 figure which you gave as the fee which your company charges for editorial use uniform no matter what the subject matter of the picture is?

A. It doesn't vary with subject matter. It would vary with exposure. Let's say quarter page in a textbook for a color photograph. If it's larger it would be somewhat more expensive.

Q. Does it vary with the subject matter of the picture?

A. No, it doesn't.

Q. It doesn't vary with the difficulty of the shoot for the photographer?

A. Not in the editorial sphere.

Q. In the advertising it might, is that correct?

A. It might, that's right.

Q. How much of that fee, the $160 fee or whatever fee you charge, goes to the photographer, him or herself?

A. It is normally a 50-50 split, so $160, photographer would get 80.

Q. And the other $80 goes to your corporation?

A. That's correct.

Q. So if the photographer was dealing with the entity himself, your fee schedule wouldn't apply at all as far as you know?

A. It would be up to the photographer to establish, [158] yes.

Q. Now, how many slide transparencies does your agency, your company have in storage?

A. Approximately a million.

Q. Not more than a million?

A. You know, we're constantly editing it down and bringing in new material. It varies. It wouldn't be substantially over a million, no.

Q. And is that the normal amount of slides kept by the agencies of your size, you spoke of before, I think you said there's about 80 agencies in the business.

MR. S. ABADY: Objection.

THE COURT: It's cross-examination.

A. You mean our size in billing or our size in number of photographs? In number of photographs, of course. In billing it varies. If it's an agency that deals in the advertising market only, as many of them do—

Q. I'm not talking about billing, I'm talking about the number of slides kept in your inventory, agencies of your type, do they maintain inventories of approximately a million images?

A. It depends how tightly they edit. Some of them would have many millions.

Q. You stated that your company—

THE COURT: Don't restate it. We heard. Just [159] simple cross-examination.

Q. Your company does not catalog its slides by photographer, is that correct?

THE COURT: That's what he told you. You think he's going to tell you differently today?

MR. MONTBACH: No, your Honor.

THE COURT: I don't either. Ask another question.

Q. If someone calls for a subject such as Central Amer[illegible] in the 80s they would get a cross-section of photographers when you pick it out, is that correct?

A. That's correct.

Q. How do you store your slides?

A. They're stored in individual plastic sleeves called Keymax, then the Keymax are stored in visosheets that store 24 images each. That hangs in a filing cabinet, it holds 124 transparencies, you can hold it up to a light box so you can see the whole sheet.

Q. Kept in filing cabinet?

A. Yes.

Q. Wood or metal?

A. Metal.

Q. Do you store any of your slides in cardboard boxes?

A. No. None that are in our current files.
[160] Q. You don't keep them in shoe boxes?
A. No, we don't.

THE COURT: I have to take a telephone call. Please take a brief recess. You can step down during the recess.

(Pause)

(Jury not present)

THE COURT: On this Exhibit 12H, it seems to me that this document after this lawsuit is hardly probative of anything. It's also an agreement between someone other than the plaintiff and the defendant and also the prior record is sufficient to show about all that can be proved on this issue of custom and practice. The testimony so far at trial seems to show that the clause is not truly enforced even among those parties who have signed a receipt.

MR. S. ABADY: Your Honor, two things. As to the exhibits we intend to introduce—

THE COURT: Besides 12H, what are we talking about?

MR. S. ABADY: All of the subparts of 12 which are examples over a period of time that refutes this defendant's abject denial of any awareness of the industry standard.

THE COURT: Anything that this defendant did before the lawsuit I suppose is permissible.

[161] MR. S. ABADY: It shows not only that, as to the second point, your Honor, I would ask you to just hold your judgment in reserve until you hear all of our evidence which can explain the particular transaction and why that one was negotiated. We have evidence as to that—

THE COURT: You're going to wind up in a situation where the jury will not be inclined to give any weight at all to this line of proof.

MR. S. ABADY: Your Honor, to put it very simply, throughout the entire industry users such as this defendant have known for almost two decades that there is a $1500 minimum industry standard.

THE COURT: But it's not paid. If they don't pay it how is it a standard.

MR. S. ABADY: I'll answer that in a moment. Users know how the standard was developed, it's written about all the time in the professional journals and the magazines.

THE COURT: They do everything with a standard except pay it.

MR. S. ABADY: Your Honor, a standard is an expectation and a legal reason why they are bound. And it's an expectation within the industry. That someone violates a standard doesn't make it not a standard.

THE COURT: Quite the contrary. The fact that [162] people perform it generally is what makes it a standard.

MR. S. ABADY: Most people who are honest in their commercial dealings do perform it generally.

THE COURT: No such evidence.

MR. S. ABADY: And there are particular circumstances that explain the deviations in particular

THE COURT: It's a jury question. I wish you would forget about it and talk about the real issue in the case, which is what are the slides worth. I'm sustaining the objection to 12H. If you'll give me the rest of them I'll make a ruling on the rest of them so I'm not interrupted.

MR. S. ABADY: I apologize for interrupting, Judge.

THE COURT: Just hand them to the clerk. The court will take those that were prior to the lawsuit.

MR. MONTBACH: Prior to the lawsuit or prior to the loss?

THE COURT: Well, I think prior to the lawsuit.

MR. MONTBACH: I think something that happened prior to the loss, your Honor.

THE COURT: It shows custom and practice and it certainly can't be claimed that anyone altered their practice because of the pending lawsuit.

[163] MR. MONTBACH: I would object to anything prior to the lawsuit, your Honor.

THE COURT: Objection overruled.

MR. S. ABADY: I'm handing up 12C, 12F, 12G—I'm sorry, 12E, F and G.

MR. J. ABADY: And the court has 12H.

THE COURT: Are they all prior in time to the lawsuit?

MR. S. ABADY: Yes, your Honor.

THE COURT: They're received in evidence. Objection is overruled.

(Plaintiff's Exhibits 12E, F and G for identification were received in evidence)

THE COURT: Bring in the jury, please.

(Jury present)

THE COURT: Please resume.

Q. Mr. Zentmaier, you testified that—

THE COURT: Whatever he testified we heard. I can't have that. That's repetitious.

MR. MONTBACH: Sorry, your Honor.

Q. Mr. Zentmaier, the cabinets that you store slides in, images, I'll use your term, images in, is metal, right?

THE COURT: That's been asked and answered.

Q. Are they fireproof cabinets?
A. They're fire resistant.

[164] Q. How do you catalog your images?
A. We file them by subject, if that's what you mean.
Q. Do you keep a separate list of the subjects?
A. Yes, we do have such a list.
Q. And do you have in your inventory photographs, images from Central America, Nicaragua, El Salvador, during the 1980s?
A. Yes, we would.
Q. Sir, are you being compensated for being here today?
A. No, I'm not.

MR. MONTBACH: No further questions.

THE COURT: Any redirect for the witness?

MR. J. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. J. ABADY:

Q. I place before you Plaintiff's Exhibit 12G. Can you tell the jury what that is, Mr. Zentmaier?
A. It's a copy of a delivery memo for photos submitted to Guidance Associates in October of 1993.
Q. And did someone sign for that delivery memo from Guidance Associates?
A. Yes, there's apparently an employee of Guidance Associates on the premises who did the selection of these images and she signed for them and she received them.
[165] Q. And could you tell the jury her name?
A. Gretchen Jones.
Q. I'd like to show you now what's been marked 12E or what's in evidence, I'm sorry, as 12E, and ask you to take a look at that and tell the jury what that document is.
A. This is a copy of an invoice that was sent to Guidance Associates in May of 1993 for the use of a photograph on the cover of a catalog.
Q. And was a one-time use purchased for that image?
A. Yes.

Q. And what was the price that was charged?

MR. MONTBACH: Objection.

THE COURT: It speaks for itself. It's in evidence, isn't it?

MR. J. ABADY: Yes, Judge.

THE COURT: Don't waste time. It's in evidence, the jury can look at it.

A. It was $700.

Q. Showing you now what is 12F in evidence. I ask you to tell the jury what that is.

A. It's an invoice to Guidance Associates dated October 20, 1993, for the use of a photograph on the cover of a catalog.

Q. And was a purchase made for one-time use of that slide?

[166] A. That is correct.

Q. And on the invoice like the delivery memo is the industry standard also printed?

A. Yes, it is.

MR. MONTBACH: Objection, your Honor.

THE COURT: It speaks for itself. It's in evidence.

MR. J. ABADY: Thank you, Mr. Zentmaier.

THE COURT: Anything else for the witness?

MR. J. ABADY: Just two more questions, Judge.

Q. Mr. Zentmaier, if you send a slide out for editorial use and you charge $160 for a first-time use for that editorial slide, and that slide is lost, what is the replacement cost?

MR. MONTBACH: Objection.

THE COURT: If he knows.

A. We would request $1500.

Q. Is the industry standard, the minimum industry standard of $1500 different for slides depending on whether they're editorial or advertising?

A. The slides are often the same slides. It's how they're used that varies. So there would be no difference in that regard.

MR. J. ABADY: No further questions.

THE COURT: Anything else for this witness?

[167] MR. MONTBACH: Very briefly, your Honor.

RECROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Zentmaier, you were shown two exhibits, 12E and 12F. Would you look at those?

A. The invoices.

Q. Yes. Were either of those invoices for photographs taken by Mr. Gasperini?

A. No, they were not.

MR. S. ABADY: Objection, your Honor, that's not disputed.

THE COURT: It speaks for itself.

MR. MONTBACH: No further questions.

THE COURT: All right. Why don't you leave before one of them changes his mind.

(Witness excused)

THE COURT: Next witness, please.

MR. S. ABADY: Your Honor, at this time plaintiff would recall the defendant William Goodman.

THE COURT: Mr. Goodman, you're reminded you've previously been sworn. Your testimony was interrupted in order to help move the trial along.

(Continued on next page)

[168] WILLIAM GOODMAN, resumed.

DIRECT EXAMINATION (Continued)

BY MR. S. ABADY:

Q. Mr. Goodman, I'm going to show you a document which has been previously marked as Plaintiff's Exhibit 11. That's a sworn statement you gave to an investigator about this loss, isn't that correct?

A. Yes.

Q. Mr. Goodman, look at Exhibit 11. It consists of four pages, isn't that correct, the handwritten version?

A. Yes.

Q. And the typed script is also the same four pages.

A. Right.

Q. And it begins at the beginning and end of each page identically with the handwritten script, isn't that correct?

A. Right.

Q. That's your signature at the bottom of each page, isn't that correct?

A. Yes, it is.

Q. You made that statement on April 30, 1993, isn't that correct?

A. Yes.

Q. And you made that statement knowing that if you made any false statement in this document, that it would be [169] a crime, isn't that correct?

A. I don't recall that.

Q. Well, look at the bottom, look at the language printed next to your signature on each page. Read it to yourself and then answer the question again.

A. Yes. You're correct.

Q. Did you tell the truth when you signed this statement?

A. Yes.

Q. On the top of the second page—

THE COURT: Is this document in evidence?

MR. S. ABADY: I'm going to move it in evidence, your Honor.

THE COURT: When you do it speaks for itself and that's the end of it.

MR. S. ABADY: Then if I—

THE COURT: You can either offer it in evidence and read any part of it you think is important and opposing counsel can read from it later but we're not going to have it come in indirectly.

MR. MONTBACH: We've already stipulated the loss occurred. This has to do with the occurrence of the loss.

THE COURT: Let me see the document.

MR. S. ABADY: There are other relevant issues involved.

[170] THE COURT: Don't discuss it in front of the jury. Go on to something else and I'll give you a ruling after I've looked at it.

MR. S. ABADY: Your Honor, the next line of questioning involves the document that I had presented to the witness last time before he was interrupted to take the testimony of Ms. Green. And in order to juxtapose the two—

THE COURT: Which exhibit is that?

MR. S. ABADY: That would be Plaintiff's Exhibit 3. I cannot juxtapose the difference in the two texts unless you let me adduce from the witness answers as to what he's written on one and compare it to what he's written to the other.

THE COURT: Is Exhibit 3 in evidence?

MR. S. ABADY: Not yet.

THE COURT: Lay the foundation for Exhibit 3 and offer it in evidence.

MR. S. ABADY: I had done that once, your Honor, but I will do it again.

THE COURT: I sustained an objection to Exhibit 3. And that's the ruling according to the clerk's records here.

MR. S. ABADY: But you did say that I could cross him on the relevant information and the information that is [171] relevant—

THE COURT: Ask him the underlying factual issue, hand Exhibit 3 to the clerk, and if his testimony differs from what he set forth in Exhibit 3, then you can call it to his attention.

MR. S. ABADY: Your Honor, the point I'm trying to show is that there's a difference in testimony given in the two documents or statements made within the two documents.

THE COURT: Focus on the underlying fact and then ask him as to what the truth is as to that fact. The court is probably going to sustain the objection to Exhibit 11.

MR. S. ABADY: I'd like to make a record on that if that's so, your Honor.

THE COURT: You can make a record, just make it. Just do something.

MR. S. ABADY: Sorry, Judge.

Q. You previously testified, Mr. Goodman, as to this loss. Isn't it true, sir, that prior to your testimony on Monday that in a sworn statement which you've acknowledged as Plaintiff's Exhibit 11 you attributed this loss not to your company but rather to Susan Green? Yes or no?

A. No, I did not. I did not, I never attributed the loss to Susan Green.

Q. Isn't it true that you identified her as someone [172] who was not employed by you?

A. No.

Q. Well, then look at page 2 of Exhibit 11.

THE COURT: Since the loss is conceded and it's his fault or the fault of the defendant, that's all you need to know. And I'm stopping this questioning and I'm limiting you to the

proof of the value of the property at the time of the loss. No more of this.

Members of the jury, it doesn't matter whether it's Ms. Green's fault or his fault.

MR. S. ABADY: Your Honor, it has to do with credibility issues, Judge.

THE COURT: That's my ruling. How can there be: Any credibility? He hasn't testified to anything that's relevant. The slides are lost.

MR. S. ABADY: If he's made—

THE COURT: The slides are lost. This jury is charged with one thing and one thing only, to fix the monetary value of the loss. If you'll just go directly to that and stop the nonsense, please.

MR. S. ABADY: Your Honor, if—

THE COURT: No, no more discussion. Do something constructive.

MR. S. ABADY: Yes, Judge.

Q. Mr. Goodman, do you have a copy of the subpoena [173] that I served on you?

A. Yes. It's in my briefcase.

Q. Could I have it, please?

(Handed to counsel)

MR. S. ABADY: I'm going to mark as an additional exhibit, your Honor, the next number which would be number 29, this subpoena. And I'd offer it in evidence.

MR. MONTBACH: No objection.

(Plaintiff's Exhibit 29 for identification was received in evidence)

Q. Mr. Goodman, I show you page 4 of the subpoena, paragraph 5, the last paragraph of the documents that you were to deliver to me in court. Do you see that?

A. Yes.

Q. And you were to search your records and to deliver to me delivery memos, is that correct?

A. Correct.

Q. You've heard testimony in this action, you know what a delivery memo is.

A. Right.

Q. Now I'm going to mark and show you the documents that were handed to me this morning by your counsel.

MR. S. ABADY: That will be Plaintiff's Exhibit 30, your Honor. And I would move those in evidence.

Q. Do you recognize, Mr. Goodman, that group of [174] documents handed to me by Mr. Montbach this morning as part of your document production?

A. Yes, I do.

MR. S. ABADY: I assume there's no objection, your Honor.

MR. MONTBACH: No objection.

(Plaintiff's Exhibit 30 for identification was received in evidence)

Q. Mr. Goodman, isn't it true that on numerous of these exhibits you have copied for me only the front and not the printed language on the back of the delivery memos?

A. Yes.

Q. And isn't it true that the language which you failed to deliver in response to that subpoena on the back of these delivery memos, on each and every one of them, there was printed that the minimum industry standard for a lost or damaged slide was $1500?

MR. MONTBACH: Objection.

THE COURT: I'll let him answer.

A. I don't know.

Q. Did you examine the documents before you produced them?

A. Some of them. But I didn't look at the back of them before they were xeroxed.

Q. Are you familiar with the content of the [175] documents?

A. I looked at one.

Q. Which one did you look at?

A. I looked at the first one that's on the sheet.

Q. And that would be from FPG, is that correct?

A. Yes.

Q. I'll show you what has been previously marked as Plaintiff's Exhibit 13F.

MR. S. ABADY: For the record, your Honor, that should be 13G. No, it is 13F. I apologize for the confusion and delay.

Q. That's a document entitled invoice, isn't that correct, what you produced to me, an FPG invoice?

A. Right.

Q. I'll show you what's been marked as Plaintiff's Exhibit 13F, that's also an FPG invoice, isn't that correct?

A. Yes.

Q. And printed on the back of that document the language you neglected to produce to me from your records is the minimum industry standard of $1500 per slide, isn't that correct?

MR. MONTBACH: Objection.

THE COURT: If he understands the question he can answer it.

A. The number $1500 is on this document.

[176] Q. It's just there by itself, hanging out there without explanation?

A. There are a bunch of words around it.

Q. That would be paragraph 10, would it not?

A. Yes.

Q. Doesn't paragraph 10 say "We both agree it is difficult to determine in advance the monetary damage FPG and the photographer will suffer—"

MR. MONTBACH: Objection, your Honor.

THE COURT: Is the document in evidence?

MR. MONTBACH: No.

THE COURT: It can't be read from.

MR. S. ABADY: I'll offer it in evidence.

THE COURT: What's the date of it?

MR. S. ABADY: It's the same form.

THE COURT: The form is in evidence. I'll sustain the objection to reading from it at this time. The form can be read from.

Q. The bunch of words as you say surrounding the $1500 is in paragraph 10 involving, which explains what you must pay if you lose an original slide transparency, is that correct?

MR. MONTBACH: Objection.

THE COURT: Sustained.

A. Is that a legal—

[177] THE COURT: Wait for the next question. The objection is was sustained.

Q. Also in Plaintiff's Exhibit 30, the documents you produced this morning, is a delivery memo from Photo Researchers Inc., Mr. Zentmaier's company, is that correct?

A. Yes.

Q. And that's to your company, isn't that correct?

A. Yes.

Q. It's your business record?

A. Yes.

Q. You also neglected to copy the back of that document and give it to me, isn't that correct?

A. Yes.

Q. You were here in court this morning and on Monday when Mr. Abady cross-examined, this Mr. Abady cross-exam-

ined Mr. Zentmaier or examined Mr. Zentmaier and presented him the various documents in Exhibit 12 which were admitted in evidence from Photo Researchers?

A. Yes.

Q. And you heard him testify that the language on the back of his form was the same $1500 industry standard, correct?

A. Yes.

Q. You heard that testimony?

A. Yes.

[178] Q. Is there a reason why you didn't make me a copy of that from your records?

A. No, no reason.

Q. But your company is aware of the industry standard, these are from your records, isn't that correct, sir?

MR. MONTBACH: Objection.

THE COURT: Compound question.

Q. Your company is aware of the industry standard, isn't that correct, sir?

MR. MONTBACH: Objection.

THE COURT: Overruled.

Q. Isn't it true that you're aware of the industry standard, your company, Guidance Associates, the Center for Humanities?

A. Yes.

Q. Now, I have the yellow Post-it attached to a delivery memo from a stock agency called Famous Food Plus as part of Plaintiff's Exhibit 30. That has the $1500 minimum industry standard for a lost or damaged slide printed on front of that form, isn't that correct?

A. Yes. But it never says industry standard. Is that word there, I didn't see that.

Q. Does it say that each transparency will cost you $1500 if you lose it?

[179] MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. That same language appears on this document from FPG entitled delivery contract, isn't that correct, sir?

MR. MONTBACH: Objection, what same language?

THE COURT: Sustained.

Q. On the delivery contract from FPG for which I've also placed a yellow Post-it note at the bottom in paragraph 3 does it not say that you're liable for $1500 if you damage or lose each or any slide?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. I'll show you, sir, what's been previously marked as Plaintiff's Exhibit 13G which is an FPG form entitled delivery contract.

MR. S. ABADY: And I offer it in evidence, your Honor.

THE COURT: Before the lawsuit?.

MR. S. ABADY: Yes.

THE COURT: Received in evidence.

MR. MONTBACH: Excuse me, what document are we doing?

MR. S. ABADY: 13G.

MR. MONTBACH: It's a form, right?

MR. S. ABADY: It's a form.

[180] MR. MONTBACH: So it's—

MR. S. ABADY: It's the same form—

THE COURT: Used by this defendant.

MR. MONTBACH: Used by FPG.

(Plaintiff's Exhibit 13G for identification was received in evidence)

Q. 13G is the same form on which your FPG delivery contract pertaining—

MR. MONTBACH: Objection to the banging.

THE COURT: Yes, the banging is kind of silly and a waste of time. Don't keep doing it.

Q. Isn't that correct, Mr. Goodman?

A. The front pages look the same.

Q. I would ask in the presence of the jury that you examine them and make sure that they're the same.

It's the same form, isn't it, Mr. Goodman?

MR. MONTBACH: Allow him to examine it.

THE COURT: The same form as what?

MR. S. ABADY: As what was produced from the business records of the defendant, your Honor, demonstrating its awareness.

A. It looks like the same form to me.

Q. I'll show you what's been previously marked in evidence as Plaintiff's Exhibit 13A, which is the delivery memo form used by Photo Researchers, Mr. Zentmaier's [181] company. That's the same form as your copy of Photo Researchers delivery memo that you produced, is it not, sir?

A. It looks to be the same.

Q. And the language on the back at paragraph 4 was not included in the copy that you gave me, isn't that correct, sir?

A. Correct.

Q. You didn't photocopy that to provide to me from your business records?

A. No.

Q. Now, your company does a lot of business with a photo stock agency in New York called Magnum Photos, isn't that correct?

A. I'm not aware of that.

Q. You're not aware of that? I'll show you what's been previously marked as Plaintiff's Exhibit 28A. This is a copy of a check from your company to Magnum Photos at 72

Spring Street in the amount of $74.75 for the reproduction of a single slide, isn't that correct?

A. I don't see where it says single slide. I see the amount.

Q. You see the amount?

A. Yes.

Q. You see what's at the top, sir? You see where it has an invoice and a number?

[182] A. Yes.

Q. There's only one number that appears there, isn't that correct?

A. Yes.

Q. And each number stands for a slide so you would presume from that there was one slide, isn't that correct?

MR. MONTBACH: Objection, is counsel testifying?

THE COURT: I don't know what he's doing.

A. I don't know.

THE COURT: Is there an exhibit in evidence?

MR. MONTBACH: No.

MR. S. ABADY: I move it into evidence, your Honor.

THE COURT: Show it to counsel.

MR. MONTBACH: He has a copy.

MR. S. ABADY: I assume there's no objection.

MR. MONTBACH: There is an objection. I don't know what the relevance of this is.

THE COURT: Is it before the lawsuit?

MR. MONTBACH: It's before the lawsuit with another company for a royalty payment.

MR. S. ABADY: In response to Mr. Goodman's answer that he did not know that his company did business with Magnum Photos.

THE COURT: I thought he did say they did **[183]** business. He didn't know if they did a lot of business.

MR. S. ABADY: I believe he said he didn't know if they did business.

THE COURT: Received in evidence just for the purpose of whether they did business.

(Plaintiff's Exhibit 28A for identification was received in evidence)

Q. And I show you, Mr. Goodman, what has been previously marked as 28B. I hand your counsel a copy. And the first page of 28B is an invoice to you from Magnum Photos, second page is a check signed by Anita Bacard to Magnum Photos, the third page is an account statement, isn't that correct, sir?

A. Yes.

Q. And on the second page of Exhibit 28B, minimum industry standard for a lost or damaged slide of $1500 clearly appears, does it not?

MR. MONTBACH: Objection. We will stipulate —

THE COURT: It speaks for itself.

MR. MONTBACH: We'll stipulate there's a figure on this document of $1500.

MR. S. ABADY: Fine, I move it into evidence, your Honor.

THE COURT: If it's in evidence, it speaks for itself. Is it something that took place with him?

[184] MR. S. ABADY: Yes, your Honor.

THE COURT: Prior to the lawsuit?

MR. S. ABADY: Yes, your Honor.

THE COURT: It will be received in evidence.

MR. MONTBACH: The company, yes, your Honor. It's something with the company.

THE COURT: He and the company are one and the same as far as the jury is concerned. No distinction needs to be made.

(Plaintiff's Exhibit 28B for identification was received in evidence)

Q. Mr. Goodman, I show you what's been previously marked as Plaintiff's Exhibit 28C, a spread sheet of all of your purchases from Magnum Photos in the month of February 28th of 1991. Isn't it true, sir, that for reproduction rights of slide transparancies, just the reproduction rights, you did over $21,000 in one month with that agency?

A. No. This isn't a one-month statement.

Q. Looking at the statement, Mr. Goodman, how can you tell that it's not a one-month statement? At the top doesn't it say for the period ended 2/21/91?

A. Yes, it does.

Q. Wasn't the computer run done on the date of March 1, 1991, and isn't that the next day after February 28th?

A. Yes, but that doesn't mean this is a one-month **[185]** statement.

THE COURT: I have to take a recess to take a phone call. Please go to the jury room, members of the jury. You can step down, Mr. Goodman.

(Recess)

(Jury not present)

THE COURT: I think that all that can be developed here has been developed and I really would earnestly commend to you that you leave this and start proving the value of the slides.

MR. S. ABADY: Your Honor, I've adduced this because I think it goes directly to the issue of valuation.

THE COURT: You've got all the evidence you're going to get on this custom and practice and it has very little value to you because the memorandum receipt was not signed in this case and this company on the occasions in the past has not paid the full agreed amount. So nothing more asked of this witness will change that.

MR. S. ABADY: Your Honor, if you look at our brief—rather than belabor the point now, because I know you want to move the case along—

THE COURT: I want to prove the value of the slides.

MR. S. ABADY: Any user's awareness of the industry standard is relevant to the proof.

[186] THE COURT: It's an industry standard when people in the industry perform it or obey the standard in their day-to-day conduct. This witness has not conformed.

MR. S. ABADY: It's an industry standard if everyone in the industry is aware.

THE COURT: They're aware but they don't obey it so it ceases to be a standard. And you'll make your record worse instead of better if you keep plugging away at this. Please bring in the jury.

MR. S. ABADY: So as to move quickly, your Honor, we were up to 13D, I believe.

(Jury present)

Q. Directing your attention to Plaintiff's Exhibit 28C, Mr. Goodman, you've paid Magnum Photos $21,599.50, isn't that correct?

A. That's correct.

Q. And you paid them that price for the reproduction rights of the various photos listed on this spread sheet, isn't that correct?

A. Yes.

MR. S. ABADY: I'd offer the document in evidence, your Honor. I assume there's no objection.

MR. MONTBACH: Objection.

THE COURT: It's offered just to show his course of dealing with this other outfit?

[187] MR. S. ABADY: Yes, your Honor.

THE COURT: I'll take it solely for that purpose.

(Plaintiff's Exhibit 28C for identification was received in evidence)

Q. Mr. Goodman, many of the delivery memos that you produced in response to my subpoena is from a stock agency called Super Stock, is that correct?

A. Yes.

Q. The majority of them. The $1500 industry standard appears in the back of each of those forms too, does it not?

A. I don't know that.

Q. But again, the backs of those forms were not copied and provided, isn't that correct, sir?

A. Right.

Q. Mr. Goodman, Bill Gasperini's slides that were part of the three-part video series that you produced, which is Plaintiff's Exhibit 10, contained a number of shots taken from scenes of civil war in Central America, isn't that correct?

A. Yes.

Q. And that was your prime motivation for selecting Mr. Gasperini's photos, was it not, sir?

A. For use in the program?

Q. Yes, sir.

[188] A. Yes, that's correct.

Q. And you were quite pleased with the professional quality of Mr. Gasperini's work, were you not?

A. Yes, I was.

Q. Now, when was the program complete, Mr. Goodman?

A. I believe sometime during the summer of 1991.

Q. That would be July of 1991?

A. I believe so. That's to the best of my recollection.

Q. And you first realized the slides were lost about a month afterwards or August of 1991, isn't that correct, sir?

A. Yes, that's correct.

That's the earliest date that you can fix the loss being realized, isn't that correct?

A. Yes.

Q. August of 1991. Now, Mrs. Charlotte Gasperini tried to get in touch with you to retrieve her son's slides, isn't that correct?

A. Yes.

Q. And when she was unsuccessful Bill Gasperini called you to discuss the loss of his slides, isn't that correct?

A. Yes, that's correct.

Q. And when you informed him—and he was out of **[189]** the country when he called you, isn't that correct?

A. Some of the times I believe he was, yes.

Q. He called you from Moscow, did he not?

A. One time, yes.

Q. During that telephone call from Moscow when you informed him for the first time that his slides were lost—

MR. MONTBACH: Objection, counsel is testifying.

THE COURT: It's compound already.

Q. I'll rephrase the question. During that telephone call from Moscow, Mr. Gasperini was very upset, was he not?

A. Yes.

Q. Upon learning that his slides were lost.

A. Yes.

Q. And during that conversation he told you they were valuable, didn't he?

A. Yes.

Q. And you told him he knew they were valuable?

A. Yes.

Q. And you told him because of that, that's why you had conducted such an extensive search, isn't that correct?

A. Yes.

Q. And that not only did you instruct your staff to do so but you yourself searched for the slides?

A. Yes, I did.

[190] Q. And that you enlisted the support of almost everyone in your agency.

A. Yes.

Q. In your firm.

A. That's correct.

Q. About 40 people at the time.

A. Right.

Q. And you told everybody there to look everywhere, everywhere they could think of to find these slides, isn't that correct?

A. I didn't say everywhere they could think of.

There were a few places where we thought they might be and had people who worked in those areas primarily to spend sometime looking for them in those areas.

Q. Well, you recall testifying at a pretrial deposition on February 14th?

A. Right, yes.

THE COURT: What page?

MR. S. ABADY: Page 55.

Q. You remember we were in that large—

THE COURT: Just read the line and the question and answer, give the line and page.

Q. You recall being there?

A. No. Please repeat the question?

Q. At 14 Wall Street, the firm of Bigham, Englar, [191] Rosen, do you recall being there?

MR. MONTBACH: Objection, your Honor.

THE COURT: Waste of time.

MR. MONTBACH: Get my firm's name right, please.

THE COURT: Read the question.

MR. S. ABADY: Jones and Houston. There's no Rosen in your firm, forgive me.

Q. Page 55. Mr. Goodman, do you remember being asked the question, referring to your staff:

"Q. Did you ask them to look in furniture and shelves and files?

"A. Look everywhere. That's what I said."

MR. MONTBACH: Objection to the characterizing.

THE COURT: I'll sustain the objection. It's not inconsistent with his current testimony at trial. Not inconsistent. He looked. He didn't find them. That's why we're here today.

MR. S. ABADY: I understand that, your Honor.

Q. Mr. Goodman, you also knew at the time you realized the loss that you would have to compensate Mr. Gasperini for this loss, isn't that true?

A. Yes, I did.

Q. And that you owed him something, isn't that correct, sir?

A. Yes, I did.

[192] Q. And you spoke about the loss many times with your chief financial officer.

A. I spoke with him a number of times. I couldn't quantify it.

Q. Now, you paid Mr. Gasperini two separate payments, isn't that correct, sir?

A. Can you be more specific.

Q. You paid him royalty payments and you paid him an editorial payment, isn't that correct?

A. That's correct.

Q. I show you what's been previously marked as Exhibit 5.

MR. S. ABADY: Let the record reflect I'm providing counsel a copy.

Q. Could you tell the ladies and gentlemen of the jury what Plaintiff's Exhibit 5 is, Mr. Goodman?

A. It's a royalty payment. It's a statement of royalties paid.

MR. S. ABADY: I'd offer that in evidence, your Honor.

THE COURT: Received in evidence without objection.

(Plaintiff's Exhibit 5 for identification was received in evidence)

MR. S. ABADY: Let the record reflect I'm [193] providing counsel with a copy of Plaintiff's Exhibit 6.

Q. These are check stubs and envelopes from Guidance Associates, the Center for Humanities, is that correct, sir?

A. Yes, they are.

Q. And they reflect your payment of royalties for the one-time reproduction of Mr. Gasperini's slides?

A. I don't know if one-time reproduction is the definition of what they represent.

Q. They represent your use one time to put his slides into Plaintiff's Exhibit 10, the video series Conflict in Central America.

A. For use in that program, yes.

MR. S. ABADY: Offered in evidence, your Honor.

MR. MONTBACH: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 6 for identification was received in evidence)

Q. Let the record reflect that I've handed counsel Plaintiff's Exhibit 7. I show you a copy of Plaintiff's Exhibit 7, Mr. Goodman. That's a one-time payment of $3500 in the top check stub that you paid Mr. Gasperini for his editorial work on the video, isn't that correct?

A. Yes, that's correct.

Q. And the check stub on the bottom is a royalty check, isn't that correct?

[194] A. That's correct.

MR. S. ABADY: Offered in evidence, your Honor. I assume without objection.

MR. MONTBACH: You've got two pages. Do you want to describe the second page?

MR. S. ABADY: Forgive me. I appreciate your reminding me of that.

Q. And the second page is two more check stubs for interim royalty payments?

A. Yes.

MR. MONTBACH: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 7 for identification was received in evidence)

MR. S. ABADY: Let the record reflect I'm handing counsel Plaintiff's Exhibit 8.

Q. Mr. Goodman, examine Plaintiff's Exhibit 8. That's a copy of the teacher's guide that Mr. Gasperini authored to accompany the video, isn't that correct?

A. Yes.

Q. And you would have that printed up and distributed with the video series?

A. Yes.

Q. And the $3500 payment was for his work in writing the teacher's guide?

[195] A. Not solely.

Q. But included in that?

A. Yes, that's correct.

MR. S. ABADY: I offer that in evidence, your Honor. I assume without objection.

THE COURT: Received without objection.

(Plaintiff's Exhibit 8 for identification was received in evidence)

MR. S. ABADY: Bear with me one minute, Judge, I think I can finish up quickly.

Q. Mr. Goodman, you heard your counsel in his opening statement—

THE COURT: No, just facts. Just ask him questions which elicit facts.

Q. Do you know what the term ex gratia means, Mr. Goodman?

A. Yes, I do.

Q. Have you heard that term used in this courtroom?

A. Not until now. Yes, I did hear it, at the beginning. That's right, Mr. Montbach used it in his opening statement.

Q. What does it mean, Mr. Goodman?

A. My understanding is it's a payment made basically in kind or in good faith —

THE COURT: In what?

[196] A. In kind or in good faith as opposed to contractual obligation.

Q. It means a gift, right?

A. Right.

Q. Something not required, it's a gift, right?

A. Yes.

Q. That's how he described the $3500 payment. In fact, Mr. Goodman, that $3500 payment was not a gift at all, isn't that correct, sir?

A. No.

Q. It was for services rendered by Mr. Gasperini.

A. Not exclusively.

Q. Do you recall, and I direct your attention, your Honor, to page 142 of the deposition, at the pretrial deposition being asked about this and do you recall being asked the question by me:

> "Q. Was it a gift or an exchange for his services?
> "A. It wasn't simply a gift, no. It was for services. Bill did render services."
> Do you recall making that testimony?

A. Yes. That means I said both, it's both a gift and for services.

Q. I see. So you want this jury to believe that you paid Mr. Gasperini a gift of $3500?

[197] Q. Can I explain what I mean by gift?

Q. Are you saying that $3500 check represented a gift to Mr. Gasperini?

A. No, I'm not.

Q. You just testified a moment ago it was for his editorial work?

A. I'm telling you that the reason I gave Mr. Gasperini the $3500 check is because Bill said to me, you know: "I did a lot of work on this program and I haven't made much money on the royalties" and I said: "I understand that, it hasn't sold as well as I thought it would and I would like to help compensate you for what's happened and the fact that it didn't work out better."

You can interpret it as you want but that was a show of good faith, help, friendship, plus he did a lot of work on the program.

Q. But it was for services, isn't that correct?

A. Sure.

Q. Is he a social friend of yours, Mr. Gasperini?

A. We met through a mutual friend.

Q. But he's not a social friend?

A. No.

Q. It's a professional relationship?

A. I wouldn't call it exclusively a professional relationship.

[198] Q. Did you ever go out with him socially anywhere?

THE COURT: Does this really matter to the critical issue to be decided here today? He would owe just as much money for these slides if he went out with him socially or if he didn't go out with him socially. Please concentrate on the issue which the jury is being called upon to decide here, how much money for the lost slides. That's all. That won't be any greater if he's a social friend or if he never socialized with him in his life.

MR. S. ABADY: Your Honor, I just—

THE COURT: Just stick on the main chance. Just get to the money. Anything else?

Q. Mr. Goodman, for clarity of the record —

THE COURT: No. Just simple questions.

Q. We're talking about 310 slides, isn't that correct, sir?

A. I believe so, yes.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Very brief, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Goodman, on Monday when you said, in response to counsel's question, that you did not consider these slides to be unique, why did you say that?

A. Because I was always under the understanding that [199] there were many slides on Central America available. Bill just happened to be the person that I knew who had been there and taken a large number of them.

Q. Is this why you responded to the question that he was the only person you knew who had pictures of Central America?

MR. S. ABADY: Objection as to his motivation.

THE COURT: Sustained.

Q. At the time you had your conversation with Mr. Gasperini, had you looked for slides of this type from other sources?

A. No, I had not.

Q. Have you done that since then?

A. No.

MR. MONTBACH: No further questions.

THE COURT: Please step down before they want to ask you something else.

MR. S. ABADY: No redirect.

(Witness excused)

THE COURT: Call the next witness.

MR. S. ABADY: I'll go get the witness, Judge.

Your Honor, the plaintiff calls Mrs. Charlotte Gasperini to the witness stand.

[200] CHARLOTTE GASPERINI, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Mrs. Gasperini, what is your relationship to my client?

A. He's my son.

Q. How old are you?

A. I'm 75.

Q. Where do you live?

A. I live in Chappaqua, New York.

Q. What's the proximity of your home to the defendant's offices? How far is your home from the defendant's offices?

A. It's about ten minutes at the most.

Q. Is your son away most of the part of each year?

A. That's right.

Q. Does he keep things at your house?

A. Yes, he does.

Q. Among the things that he kept at your house, did he keep his slides?

A. Yes.

Q. Taken throughout his career?

A. Right.

[201] Q. Describe to the ladies and gentlemen of the jury where you live.

A. I live in a carriage house apartment on an estate. There are four dwellings on the estate and this is, Haight's Cross-roads is the address.

Q. Are you a tenant in the carriage house?

A. I'm a tenant.

Q. You don't own the estate?

A. No. No, I rent the carriage house apartment.

Q. How large is the estate on which you live?

THE COURT: That has nothing to do with the value of the slides.

MR. S. ABADY: It does, your Honor.

THE COURT: How big the estate she lives on has nothing to do with the value of the slides. She has a home there. I'm not talking it. You are wasting my time. You concentrate on the value of the slides. That's all this jury has to find out, what those 310 slides are worth.

Q. Mrs. Gasperini, would you describe the security of the estate that you live on?

A. Yes. We have, the security as far as where the slides are?

Q. Yes. The slides and the home in general.

A. Right. My landlord has a security fire protection system which the alarms are in every dwelling. [202] Actually, I'm sort of centered where I am so that the telephone number, the telephone extension to where the fire place, it's called Guard-ware, it is connected to them and they call me if the alarm goes off. And all the alarms go off at the same time whenever there is a problem of fire protection which is to me, that's always been very important.

Q. Please continue.

A. Anything else? I can tell you about I have, it's a very, very strong dwelling, an old dwelling. And I'm very protected there myself.

Q. Is it fenced in?

A. Oh, yes.

Q. Around the perimeter?

A. The entire place.

Q. Is that several miles of fencing?

A. Yes. A gate on Haight's Crossroad. That's been one of the great things for me since my husband died that I could have that kind of protection.

Q. What was Bill's attitude towards his slides in terms of how they were to be cared for?

A. Bill is a very organized guy and the slides, whenever they came from, what do you call it, the publisher—

Q. The developer.

[203] A. The developer. Whenever they would come, they usually came in plastic taped boxes. And I would put them in large boxes which are very strong boxes and I would put them in the storeroom, which there's no entrance except an electronic door. And when he would come, he would take the slides and edit them, but as soon as they came through the mail.

Q. Did Bill ever throw his slides around loose in a cardboard box?

A. Never.

Q. Did he ever leave them loose in a shoe box?

A. Never.

Q. Did he ever leave his slides laying out loose or toss them around as if they were meaningless or valueless?

A. After he had edited them he would put them in binders and some of those were stored in a closet in my guest room. But otherwise, he never, never did that.

Q. Have you ever been burglarized or robbed at home?

A. No, Never.

Q. What has been your attitude about maintaining Bill's slides?

A. I've always felt that I was the guard to take care of them.

Q. Did there come a time when you attempted to contact William Goodman, seated there at defendant's table, **[204]** at the end of the summer of 1991 about Bill's slides?

A. I did several times.

Q. Describe for the jury your efforts?

A. Bill, he was I think at that time in Saudi Arabia, and every time he would call me he'd say did you ever get my slides from Will and I did call Will and at one point when I called to ask, meanwhile the video had been published, and I asked him if I could see the video and he sent the video to me at my position at the high school where I was working and I asked about the slides and he said that he was working on that.

Q. Did he ever tell you outright in the first telephone conversation that they were lost or couldn't be located?

MR. MONTBACH: Objection.

THE COURT: It's sort of a leading question, isn't it? The slides are lost. There's 310 slides that are lost. I keep trying to direct your attention to that fact.

MR. S. ABADY: I'll move on, your Honor.

THE COURT: This jury wants to know any information which will help them put a money value on them.

MR. S. ABADY: We're getting there, Judge. We have witnesses lined up all day.

THE COURT: When did you first learn they were lost?

[205] A. I don't think Will ever told me that they didn't know. I think he was looking for them in a warehouse because he hadn't found them previously.

Q. Moving on, Mrs. Gasperini, what was Bill's attitude when he would call about the slides?

A. Well, he was very concerned.

Q. Did you offer to retrieve them?

A. Yes, I did.

Q. Did you offer to Mr. Goodman to retrieve them?

A. Yes, I did.

Q. What was his response?

A. He said no. He said when I get them I'll get them to you.

MR. S. ABADY: No further questions, Judge.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Yes, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mrs. Gasperini, the boxes in which—strike that question, please. You stated that you received—

THE COURT: Whatever she said we heard. No repetition.

Q. You received the slides—

THE COURT: Come on, no repetition.

MR. MONTBACH: I'm not tryint to repeat. I'm **[206]** trying to set the stage.

Q. What type of boxes did you receive the individual slides in? You talked about coming from the developers.

A. Most of them, some of them were, they were different developers. Kodak. And many of them were Fuji, and they were strong, black, not black, they were green boxes.

Q. The Fuji ones?

A. Yes.

Q. Kodak was yellow?

A. Yes, you got it.

Q. Did you receive these boxes from places other than Kodak and Fuji?

A. I don't remember. There were others.

Q. You always received them straight from the developers?

A. No, no.

Q. You always received them straight from the developers?

A. Directly.

Q. Did your son ever bring them to you, ever bring you the boxes with the developed slides in them?

A. You mean Bill?

Q. Yes.

A. No, they came by mail because he was always out **[207]** of the country.

Q. Your daughter in California never gave you boxes of slides?

A. No because this period of time was when Bill was in Nicaragua and in Saudi Arabia, wherever he was it was during that period of time that I was living there and they were sent to me because the developers were, I think, in New York.

Q. And when you received these from the developers, you would place them into a fruit box?

A. I wouldn't call it a fruit box. For years I, they were called Mixon, and they were very strong cardboard boxes. I've used them—

Q. Boxes like you receive grapefruit in when it's mailed to you?

A. That's right.

Q. Do you have a box like that with you here today?

A. I don't have one.

THE COURT: We're not going to waste time with the box.

MR. S. ABADY: We have it.

THE COURT: Did they fall out of the box?

MR. MONTBACH: No, to my knowledge, no.

A. Very solid box.

THE COURT: Neither attorney wishes to **[208]** concentrate on the fact that there's 310 lost slides that have a value of some monetary amount that this jury has to fix. They want to talk about a box.

Q. Were the mailer boxes that you had placed inside of other boxes before they were put into the fruit box?

A. The mailer boxes —

Q. The small ones from Kodak or Fuji?

A. Yes. They were directly, and they were taped, and they went directly into those boxes as soon as they came until Bill needed them.

Q. Were any of them placed into a yellow shoe box?
A. No.
Q. Were any of them placed into paper bags?
A. Never.
Q. Was there a brown bag with the label Squire's on it inside one of the fruit boxes containing slides?
A. No.
Q. Squire's of South Greeley Avenue, Chappaqua, New York?
A. No.
Q. AGFA chrome slides?
A. No.
Q. Mailer boxes that were developed by a company named AGFA, AGFA chrome mailer boxes?
A. That's a name—
[209] Q. Silver boxes?
A. That's a name that I remember.
Q. Were ten of those boxes placed in a brown bag from Squire's?
A. I don't know. It was after I took care of them.
Q. Did there come a time when you were asked by your son to deliver any slides to Center for the Humanities?
A. No.

MR. MONTBACH: No further questions.

THE COURT: Anything else for the which necessary?

MR. S. ABADY: Nothing, your Honor.

THE COURT: Thank you, very much. You're excused.

(Witness excused)

THE COURT: Call the next witness.

MR. S. ABADY: Your Honor, at this time we would like to call the plaintiff William Gasperini to the witness stand.
Judge, can I ask what time do you expect to break for lunch?

THE COURT: You can ask.

MR. S. ABADY: What time do you expect to break for lunch, Judge?

THE COURT: When I'm ready.

[210] WILLIAM GASPERINI, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. J. ABADY:

Q. Bill, what is your profession?
A. I'm a journalist.
Q. Specifically what type of journalist?
A. I work in three different media, print, that is writing for newspapers, radio and photo journalism.
Q. By whom are you presently employed?
A. CBS news and the Christian Science Monitor.
Q. How long have you worked as a professional journalist?
A. Roughly eleven years.
Q. Who have you worked for?
A. In addition to CBS and Christian Science Monitor I've worked for UPI, United Press International, I've worked for McLean's Magazine in Canada, that's the largest news magazine in Canada, I've worked for the Canadian broadcast, I have worked for In These Times, a weekly political and economic analyst publication out of Chicago, I've worked for Pacifica News Service, a news agency based in San Francisco, and the Kansas City Star, Saint Petersburgh Times, Oakland Tribune and other newspapers.
[211] Q. I show you now what's been previously marked Plaintiff's Exhibit 15, press credentials.

MR. MONTBACH: We don't dispute that he's a print journalist, your Honor. I don't know why we need his credentials.

THE COURT: I don't either. Do they have anything to do with the value of the slides?

MR. J. ABADY: I think they do.

THE COURT: What is it?

MR. MONTBACH: His press credentials.

THE COURT: If it will save time, I'll take his press credentials. Show them to the clerk. Let me look at them. If you offer it in evidence you're not going to waste a lot of time like have you ever been to Colombia or to, you got one here you can't even read.

MR. J. ABADY: I'd like to offer it into evidence, Judge.

THE COURT: Exhibit 15 is received in evidence with the understanding that you will not duplicate it by interrogation.

(Plaintiff's Exhibit 15 for identification was received in evidence)

MR. J. ABADY: I would like to establish where he's worked.

THE COURT: He can tell where he worked in [212] Central America. All the slides that are lost are Central American slides, right?

MR. J. ABADY: Yes. But I think—

THE COURT: What you think is vital to you but my concern is to address the value of these slides. We've spent a whole morning and we haven't learned anything that improves or disproves the value of the slides.

MR. S. ABADY: Judge, if I may, in our brief on page 21, we have discussion—

THE COURT: I'm not concerned with what's in the brief. Just interrogate the witness.

Q. As part of your work as a photojournalist, have you traveled throughout the globe?

A. Yes, I have.

Q. Do you speak—how many languages do you speak?

A. I speak five languages.

Q. What are they?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. In addition to English I speak Portuguese which I learned in Brazil, I speak Spanish, I speak French and Russian and I'm still in the process of improving my Russian because I live currently in Moscow.

Q. Can you explain what the importance of language to being a photojournalist is?

[213] A. The importance of language is when you are living in a region and you're based in a region which is what have been in my time as a correspondence overseas, it's important to be able to communicate with the people in the country where you're living, to get a fuller understanding of the country, the culture, the people, to help you in performing your duties which in my case was to report on events that were happening and to take photographs.

Q. How was being able to speak the language relevant to being able to take photographs?

A. Well, typically when you would go into a remote region or for example into a village and you wanted to take pictures of people, if you just pointed the camera at them you often wouldn't get a very good quality photograph. If you see someone who looks totally different, totally strange, you would need to have a little time to establish some rapport. Being able to speak the language helps immeasurably in terms of your connecting with the people. Everything that I would do, especially in photography.

Q. What is your educational background?

A. I have a bachelor of science degree from Cornell University, a major of rural sociology development studies. I received that in 1980. Subsequent to that I studied at California State University Heyward, I have a teaching credential for primary level in Spanish bilingual [214] educational emphasis.

Q. What was the importance of your training in rural sociology to taking photographs?

A. Well, rural sociology and development studies decided to major in that after I had lived in Brazil, worked as a social worker for almost two years. It was also my introduction to Latin America. It is a way to better understand the dynamics of what's going on in what's commonly referred to as the

Third World which includes Latin America. It's important to gain a better understanding of what the reality is in these countries, why there is poverty, why there's a need to help people, why there's political turmoil, civil war.

Q. What did you do after you graduated from Cornell University?

A. I worked in Mexico for two professors for Cornell University in two different research projects and then I traveled for the first time to the Central American region which at that time was in a lot of turmoil in both Nicaragua and El Salvador. And while I was at Cornell from 1978 to 1980 I had become very involved with groups there that were interested in what was happening in Central America, so I wanted to have a firsthand look at what was going on.

Q. Was the work that you did in Mexico the first time that you had been to Latin America?

[215] A. No, I had been to Brazil from 1975 to 1977 where I worked as a social worker on a Peace Corp type of a program. It wasn't the Peace Corp but it was similar. But my trip to Mexico in 1980 was the first time I had been to Mexico and the Central American region.

Q. When you came back from Mexico, what did you do?

A. I located in the San Francisco Bay area, specifically in Oakland, and began to work in a number of jobs including my first bona fide job in journalism which was for an agency called Interpress Service, a news service based in Rome and covers basically issues in the developing world. I worked for them for eight months when the decision was made to close the Oakland office for various reasons. After that I worked for two years as a teacher in a Spanish bilingual school in Oakland, in the inner city part of Oakland.

Q. Did there come a time when you launched your career as a foreign correspondent?

A. All through the time I lived in California up to the end of 1983 I was continuing my interest in the region of Central America, I had a lot of colleagues who were going there and coming back, I went down again on two different trips during that time. I also had intention to become a correspondent. I made a deliberate decision in 1983 to leave Oakland and

relocate to Central America to work as a [216] journalist. To do that, I worked as a volunteer for a local radio station to learn radio skills, and I moved to Nicaragua in the beginning of 1984.

Q. And why did you choose Central America to travel to?

A. Because of my longstanding interest in the region, because of the turmoil that was continuing because there was a lot of press interest. At the time it was becoming the dominant news story, foreign story in all the newspapers, media in the United States. It was a region of vital interest to the United States. I felt the American public, having been there already, I felt the American public didn't understand the full dimension of what was happening and why, especially the U.S. involvement in the conflicts there and I thought it was my, I felt a need to go there, not only for my own career development but also to try to better inform the American public about what was going on.

Q. When you say you went there partly for your own career development, what do you mean by that?

A. I had decided that the time had come for me, if I wanted to become a journalist, to do it full-time.

Q. Why did you go abroad rather than stay in the United States?

A. I think it was a decision because again I was [217] keenly aware of what was happening there, I felt the opportunity to work, to start a career in journalism was better there. I could have remained in the United States and perhaps have earned more money than I did subsequently. There are a lot of different variables. It was a risk. I knew there was a certain amount of sacrifice involved, that's why I stayed in Oakland teaching to be able to build up a little bit of a saving so I could begin my career in Central America without having to have a steady paycheck. I just felt it was the logical place to go for many reasons.

Q. And how long was your initial trip as a professional photojournalist to Central America, how long did that last?

MR. MONTBACH: Objection. There's been no testimony of being there as a professional photojournalist. Radio journalist is what he was testified to.

THE COURT: You can ask him about that.

Q. What kind of work were you doing when you first went to Central America?

A. I began working for several radio stations that I had connections to, I began writing for In These Times, I was taking photographs from day one and I stayed the initial time was from the beginning of 1984 until the fall of 1986.

Q. And were you working specifically as a photojournalist as of your first day in Central America?

[218] A. Yes.

Q. And after finishing that first two and a half year stint in Central America, where did you go then?

A. I came back to California for a brief vacation and made the decision to travel to Asia, what you could probably describe as an unofficial sabbatical to visit a different region. I was so engrossed by what I had experienced in Central America, I felt that seeing a different region that was similar but different, would help broaden me in terms of my perspective and understanding. I traveled to Asia and to the countries of South and Southeast Asia and spent a year there before returning in the fall of 1987.

Q. Did you work as a journalist and a photojournalist while you were in Asia?

A. Yes, I did.

Q. Did there come a time when you returned to Central America again after the Asia visit?

A. I returned in the fall of 1987, I think it was in November.

Q. Can you explain to the members—did you begin to work again as a journalist and photojournalist?

A. Yes. I continued working as I had when I left and remained through the end of 1990, three more years there.

[219] Q. Can you explain what was going on in the region when you returned?

A. The conflicts were continuing, especially the civil war in El Salvador. But there was a new dimension. In 1987 the presidents of the five countries signed a peace agreement wherein a peace process was under way, a process of negotiating in the countries that were in conflict. So that became a

very dominant part of the news story, the ongoing peace process. So the two dominant stories that I covered, although there were many, were the peace process as well as the ongoing conflicts themselves, especially in El Salvador and Nicaragua.

Q. And in addition to El Salvador and Nicaragua did you also work as a journalist and photojournalist in other countries in Central America?

A. Yes. In 1989 I also traveled twice to Panama because of the situation there, the regime of Noriega who was ultimately overthrown by a US invasion in the end of 1989. I went there in May of that year to cover the elections which Noriega then annulled and tried to eliminate, and I also returned to cover the aftermath of the invasion.

Q. Was there any country in Central America during your approximately seven years between 1983 and 1984 and 1989 that you did not work in as a professional journalist?

[220] A. Was there any time?

Q. Any country? Did you work in all the Central American countries?

A. Yes. I worked in all the Central American countries and towards the end of the 80s I began to include Cuba a couple of times, including Mexico, including Colombia and I also made a trip to South America to Paraguay, Bolivia, Peru.

Q. Were you working as a photojournalist throughout that time?

A. Throughout that time.

Q. In 1990, where did your career take you?

A. 1990 Nicaragua had been the place where I was based throughout this whole period. The war there was coming to an end because of the peace agreements, because of the elections which ousted the Sandinista government in February of that year. I reached a point where I began to feel that it was time to move on to a new region. I wasn't sure exactly where I would go but that, of course, depended on what CBS, which is the company I was working for most of the time, felt was proper. And in August of that year, when Saddam Hussein invaded Kuwait, that provided the next opportunity.

I left Nicaragua in the fall of 1990 and went on to the Gulf in early 1991 to cover the Gulf War.

[221] Q. And how long did you remain in the Middle East covering the Gulf War?

A. I was there for the first five, well in the Gulf region from January until May of 1991. And then I, that was for the Gulf War and the aftermath in Kuwait and in Iran and in southern Iraq. And then I moved to Egypt and spent the summer reconnoitering and deciding where to go next, doing some work there, in a sense unwinding from the Gulf War which had been a very intensive time for me. And then I made the decision to move to Moscow after August 1991 when the coup attempt against Soviet president Gorbachev happened. And CBS had indicated that there was a real need for more coverage of Moscow.

So I up to that point had maintained all my life an interest in the Soviet Union and for obvious reasons and felt it was a very important place to get to know and to experience and so I moved to Moscow in the fall of 1991 and have been living there ever since, based in Moscow, covering events in Russia and the other former Soviet republics. On occasion I have been sent to locations, including Somalia in 1992, and most recently I was sent just this month to France to cover the anniversary of the D-Day invasion of 1944.

Q. And during that—does that bring us up to date?

A. That brings us up to date.

Q. And during those eleven years, what media were [222] you working in?

A. I was working in print, in radio and in photo journalism.

Q. In your career as a journalist, how many articles have you written?

A. I've written hundreds of articles.

Q. I'd like to show you what's been marked as Plaintiff's Exhibit 16A and 16B which have been previously provided to adversary in discovery. I ask you if you recognize those.

A. Yes.

Q. What are they?

A. They're copies of articles of mine that have appeared in various publications from 1983 to the present date.

Q. And you're the author of those?

A. Yes.

MR. J. ABADY: I move those into evidence, Judge.

MR. MONTBACH: No objection.

THE COURT: Received without objection.

(Plaintiff's Exhibits 16A and B for identification were received in evidence)

THE COURT: These are your best articles or your representative articles?

THE WITNESS: All of them.

[223] THE COURT: All of your articles?

THE WITNESS: Give or take a few that may have gone astray.

THE COURT: All of those that have been published?

THE WITNESS: All those that appeared in print. Radio, no.

Q. How many times have you done a radio report? How many reports have you filed?

A. In my career I've filed as we call it thousands of radio reports.

Q. And in your career as a photojournalist, how many photographs have you taken?

A. Thousands. Approximately 10,000 to date.

Q. And do you own professional photocopying equipment?

A. Yes, I do. I use mostly Nikon cameras.

Q. Can you explain to the jury your repertoire of equipment?

A. I have two camera bodies, to have different kinds of film available at all times, including a series of lenses including a telephoto lens, 210 millimeters, which allows you to take a photo from a distance and get much closer to the subject. I also have a wide angle lens which allows for a much broader view. In other words the range is from a [224] wide angle to a close up from a distance. Flash units. I carry a camera bag that has all this equipment in it including filters for

during the daylight time, polarizing filers which you use often to cut down on glare and haze and things like that. I've had a number of camera bodies over the years as well as camera bags. I've always maintained roughly that quantity of equipment.

Q. Have you sold your photographs over the years?

A. Yes.

Q. Up to date, who have you sold the photographs to?

A. I sold photographs to various publications, mostly newspapers, primarily to a company, stories that I've written for them. Some of those photographs are included in the volumes here with the stories that I submitted to those newspapers. I also have a number of photographs that I took during the Gulf war at a stock agency in New York, Impact Visuals. I also sold photographs for the use in a computer CD ROM format for a program on Central America. I received a grant to produce a series of slide shows on my travels in Asia. And of course I also helped to produce and contributed the photos to the Guidance Associates video.

Q. Showing you what's been marked previously 19B and 19A in evidence, copies of these have been previously provided to the adversary, I ask you to identify those, tell the jury what those are.

[225] A. These are two versions of a computer program about Central America entitled Hidden Agenda. Approximately 15 of my photographs of Central America were used for the graphics of this program. The program was produced and published at the end of 1987.

Q. Why are there two?

A. One is a spring board. This is a scholastic edition which is for school use and this is a spring board which is for general use. It's general consumer use.

Q. In addition to the photographs that appear in the program, is one of your photographs on the cover?

A. Yes. One of my photographs is right here in the center.

MR. J. ABADY: Judge, at this time I'd move that into evidence.

THE COURT: Will the jury be able to read it or see it?

MR. J. ABADY: They'll be able to see it and read the packaging.

MR. MONTBACH: Objection, your Honor.

THE COURT: Unless they can view it it can't be received in evidence. I'm going to have to make arrangements for the jurors to have down time so they can look at these other things in the jury room.

MR. J. ABADY: I don't anticipate that the jury [226] would need to actually view the video but I do think that they should see one of the uses that his photography can be put to.

THE COURT: Can we limit the offer to the cover?

MR. MONTBACH: The cover is fine.

THE COURT: The cover is received in evidence. You're not to speculate as to what the inside of it shows. Now on the three volume video I assume they have to look at that because that will show them some pictures. Just consider the cover.

(Plaintiff's Exhibit 19A and 19B for identification were received in evidence)

Q. How much were you paid for the use of your photographs in that?

A. Approximately $2,000.

Q. Showing you now what's been previously marked Plaintiff's Exhibit 17, it's also been provided previously in discovery. I ask you if you recognize that?

A. Yes.

Q. Can you tell the jury what that is?

A. This is a magazine called Nicaraguan Perspectives. It was a magazine published throughout the 1980s in San Francisco dealing with the issue of the situation in Nicaragua, especially the Contra war, so-called Contra war and the U.S. involvement in that country.

[227] Q. Do several of your photos appear in that publication?

A. Yes, they do.

MR. J. ABADY: At this time I would offer that in evidence.

MR. MONTBACH: I object to that.

THE COURT: Show it to counsel. I'll rule on it next time we have a recess. What's the exhibit number?

MR. S. ABADY: 17, Judge.

THE COURT: After you finish looking at it, hand it to the clerk. Frame the next question.

Q. In addition to your sale of photographic images over the years to magazines, different publishers, did you also have occasion to do slide shows?

A. Yes.

Q. Educational slide shows?

A. Yes.

Q. Were you invited ever to make a professional presentation at the university level?

A. Yes, I was.

Q. I'm showing you now what's been marked as Plaintiff's Exhibit 21. I ask if you recognize that.

A. Yes.

Q. Could you tell the jury what that is?

A. This is a letter pertaining to a presentation **[228]** that I made at SUNY Purchase, State University of New York, purchase, in which I showed slides that I had taken during my travels in Asia and also discussed my knowledge of Central America. It was a long, one day forum to academics, teachers from around the southern New York State area.

Q. And were you paid as a professional photojournalist for having done that?

A. Yes.

Q. You received an honorarium for that?

A. Yes.

Q. Approximately how much do you recall?

A. I believe it was approximately a thousand dollars.

Q. And that letter is a confirmation of that?

A. It's a confirmation of the event.

MR. J. ABADY: At this time I'd move Plaintiff's Exhibit 21 into evidence.

MR. MONTBACH: No objection, your Honor.

THE COURT: Received without objection.

(Plaintiff's Exhibit 21 for identification was 21 received in evidence)

Q. Bill, how did you get started in photography?

A. I began taking pictures when I was a teenager. A friend, the father of a friend of mine was a professional photographer. He taught me the nuts and bolts of taking **[229]** pictures, other than Instamatic type pictures that I had taken when I was even a child. I began to learn the difference in the kinds of cameras, the kinds of lenses, the meaning of f-stop, depth of field, how to keep things in focus, how to frame shots, how to make shots look more interesting.

This man's name is John Ashworth. He lived in my community and he would have a weekly session with myself, one of my brothers, a couple of other friends of ours and we learned the nuts and bolts. After that I began taking pictures when I was still in high school with another friend and other colleagues and throughout the course of my life I have always taken pictures.

Once I got to Central America, working in a more professional capacity. Training in photography never stops, you're always learning new techniques. I learned from a lot of top quality photographers including those who work for publications such as National Geographic, Newsweek, other magazines. I've been with them many, many times in situations and I've learned as I've done it.

Q. Do you have any academic degree in photography?

A. No.

Q. And why is that?

A. Photography is something I think you learn more by experience. You could have formalized training, perhaps. **[230]** But I think it's true in journalism in general. It's possible to get a graduate degree in journalism but I think it's

something that a person has talent for or an eye for in the case of photography and it's more of an experiential kind of a thing that you acquire as you go along.

Q. Is it common for professional photographers to not have an academic training in photography?

MR. MONTBACH: Objection.

THE COURT: Some do and so don't, isn't that true?

THE WITNESS: Some do and so don't.

Q. Could you explain to the jury, Bill, the difference between photography and photo journalism?

A. Photography, taking pictures can be, in a common sense, is having a camera, taking a picture to remember an event, to remember a person, to remember a place, the kind of thing that ends up in the family scrap book.

Photography, and especially photo journalism is something else. Photography is something where you're trying to make a statement in the photograph. You're not taking it to show here's my Aunt Millie on vacation. You're trying to have an image that tells people a story, tells people something about a place or a person or an event.

Photojournalism is that process, the idea of conveying something by being in a place, by understanding a [231] place, a people, a culture, and be able to convey that through photographs, through visual images.

Q. And is that why language and living in the region is important?

A. Yes, I would say so.

Q. Bill, what percent of your income up until now has been derived from the sale or the immediate marking of your photocopying material?

A. It hasn't been substantial. It's been between five and ten percent on average over the course of the years. There are many reasons for that but it's never amounted to a dominant part of my income.

Q. And what would the dollar figure be roughly of five to ten percent?

A. It would range from a few hundred dollars in a given year to a few thousand dollars.

Q. And why have you not sold more of your photography up until this point?

A. I made the decision early on that I was involved in the process of news gathering, particularly in the years I lived in Central America. It was important to focus at the time on different media that I was working in. And the immediate use of print articles and radio reports was evident. It's not something that has lasting value.

And that's why I have been a reporter as well as [232] a photojournalist. My photography is something else. It has a more long-term use value. I had intention to use my photographs in a project sense. Unlike some news photographers who focus only on taking pictures, I made the decision that my photography would be something that I would build over time, I would accumulate a body of work from which I could then make use of.

The other problem was logistics. At the time Nicaragua was under an economic embargo from the United States. Relations with very strained. It was difficult for me to see my photographs. I would take pictures, I would accumulate certain numbers of rolls of film, I would take them back to the United States with me, I would come back on the average once a year and have them developed.

But to be able to make use of them required a lot of editing, required the need to go through them, to select the ones that were appropriate to send them into agencies and I decided I didn't have time to do that at that point and it was better to build up a reserve or stock. Which is what I did. And then later on with that body of work I would put them to different uses, such as the game, the video, other projects.

Q. What is the typical fee for compensation of a photograph used to accompany a story in print?

A. The fees that you receive —

[233] THE COURT: Talking about his fees?

MR. J. ABADY: Yes.

A. My fees are typical fees that newspapers would pay, usually for a photograph it ranged, it was $50 was average, 50 to a hundred dollars sometimes. Somewhere in between. But in an immediate news sense, that would be a typical fee. That's what I would receive.

Q. When you say typical, you mean that's what was said paid to photojournalist or photographers for an immediate news photo?

MR. MONTBACH:Objection.

THE COURT: Sustained.

MR. J. ABADY: I think he has a basis —

THE COURT: He can answer but you want to rephrase his answers. But you can't do that. Ask the next question.

MR. J. ABADY: I think it's clear, Judge.

Q. When you say that was a typical fee, what do you mean?

A. That was the fee that I was told I would receive when I contacted a newspaper. I would say I have photos to accompany this story. Great. Send them in, we'll look at them. If you use them, how much do I get? $50, $100, $75, whatever it was. Other colleagues in the same situation, that's what I would receive, they would receive similar [234] kinds of fees.

THE COURT: You did that while you were in Nicaragua?

THE WITNESS: Yes.

THE COURT: When you get that payment, who owns the picture?

THE WITNESS: Excuse me.

THE COURT: After you receive the payment, who owns the picture?

THE WITNESS: The payment is only a one-time use by that publication. They would also return the original and I would

be able to use it any time after that. It was only for one-time use.

Q. I'm going to show you now what has been collectively marked 18A through J. I give a copy to the adversary and a copy to the court. And I ask you if you recognize this?

A. Yes, I do.

Q. What is this exhibit 18?

A. Examples of my photography from different parts of the world.

Q. Photographs that you took?

A. Photographs that I took.

MR. J. ABADY: At this time, Judge, I'd move these into evidence.

[235] MR. MONTBACH: I'll object, your Honor. Not one of them is of Central America.

MR. S. ABADY: That's right, those were lost.

THE COURT: That goes to the weight of it. Are none of these Central America?

THE WITNESS: None are from Central America.

THE COURT: Do you have any of Central America?

THE WITNESS: I have outtakes, ones that I don't consider to be of top quality.

THE COURT: Received in evidence.

MR. MONTBACH: I object to the ones taken after the ones in Central America.

THE COURT: I assume that his ability as a photographer hasn't changed materially before and after. These are given —

MR. MONTBACH: I don't know if that's a safe assumption, your Honor.

THE COURT: These are given to you for the purpose of assessing the quality of his work, members of the jury.

(Plaintiff's Exhibits 18A through J for identification were received in evidence)

Q. Take the first photograph and just hold it up to the jury and could you just explain where it's from and the conditions under which it was taken?

[236] A. This is from Tibet. It was taken in late 1986 when I visited that company. It shows people there during harvest season, harvesting there's the barley which is the staple food there. In the background there's the ruins of an ancient citadel and the skyline of the Himalayan mountains. This is not far from where Mount Everest is located. It was taken on my Asia travels.

MR. S. ABADY: Your Honor, I'll distribute these to the jury?

THE COURT: Yes, they can be shown to the jury.

A. The second photograph is also taken in Tibet. This was taken in the capital city of Lhasa. It shows a musician playing an indigenous instrument and a number of people gathered around singing and watching.

Q. The next one?

A. This photograph is also taken on my Asia trip. It was taken in Nepal which is the country just to the south of Tibet, in between Tibet and India. It shows a fisherman casting his net in a stream.

The next photo shows two people who are commonly referred to as untouchables in India, people at the bottom of the caste system in that country, sweeping the street. I believe this was taken in northern India also on that Asia trip.

Q. You can proceed with the next photo.

[237] A. This is a picture taken in Pakistan. It shows a typical metal working shop, two men making craft items in the foreground and in the background a statute of the one of the Hindu gods, the elephant god Ganesha. This was taken in one of the remote villages that I visited in remote Pakistan.

Q. When you say remote, what do you mean?

A. A place that was fairly off the track, the beaten track and involved a certain amount of effort to get to.

The next photograph was taken in northern Sri Lanka, which is a country that's been convulsed by civil war for eleven years now, a very bloody civil war. These are two Tamil Tiger rebels in the Jaffna Peninsula. They have seized this area and controlled it. I had to get special permission from the government which is fighting against the rebels, the rebels want to separate that part of the country and declare their own state. A very conflictive war zone which was very, very similar to the war zones I was familiar with in Central America, particularly El Salvador and I was flown up there after a lot of bureaucratic problem, I was flown up to the area by helicopter, walked across a no-man's land, meaning a barrier where the government side was on the one side, and the rebels were on the other and then I spent several days on the rebel side, interviewing them, taking pictures, getting their side of the story basically.

[238] The next slide was taken during the Gulf War. It shows one of 700 oil wells that were set on fire deliberately by the Iraqi troops as they were withdrawing, as the allied forces were advancing into Kuwait. This picture, although it looks like it was taken in the dead of night, it was actually taken in the middle of the day, in the Gulf, very bright sunshine day, but because of the number of fires and the thick black smoke that covered the entire horizon, it seems like it's the middle of the night.

Q. This was taken in the middle of the day?

A. Middle of the day, yes.

Next photograph is another picture that was taken during the Gulf War. It shows an abandoned Iraqi tank and some of the remains of whoever was commanding the tank, and then you can see in the background several of the oil well fires raging. It took until the end of 1991 for teams from the United States and Canada to put out the fires at great risk.

Going into the oil fire area was always very kind of precarious situation because of the intense heat and of course we covered our noses and mouth because of the fumes. It was a very bleak kind of a place. Almost surreal to drive out of a bright sunshine day into this blackness which was just horrifying to see and also to think that all of this oil was going

up in smoke and the cost to the [239] environment it was causing.

This photograph was one of those that I placed with the photo agency Impact Visuals and it appeared on the cover, front cover of a magazine or a newspaper in Texas.

Q. Just to interrupt you just for a minute. You mentioned that this was on the front cover of the Dallas Observer —

MR. MONTBACH: Objection.

THE COURT: I'm sorry. Will you just continue with these exhibits. Don't butterfly around. If you want to offer that later on you can mark it as an exhibit and lay a foundation for it.

MR. J. ABADY: Yes, Judge.

A. These photograph shows children in Somalia. This was taken in January of 1991 after I had been there, I was sent on assignment there, I spent five weeks in Somalia itself and then some months after in other countries of Eastern Africa.

It shows children who had been starving receiving food from United Nations workers in one of the many, many feeding centers in Mogadishu, and this was the whole reason for the intervention led by the United States to restore order in that chaotic country and to feed the people who were starving.

The following photograph is also in Somalia. [240] This is a convoy or a brigade of soldiers who were a part of the multinational force. These particular soldiers happened to be from Botswana, another country in Africa, and it's also taken from Mogadishu, the capital.

The following photograph is also in Somalia. This was a food drop. After the initial intervention feeding people in the major urban areas, there was an effort made to get out to the really remote parts of the country and bring food in. People in these isolated regions were without food and were quite desperate and I went out in one of these helicopters to this area as they were bringing the food in to deliver it to the people.

And the final photograph is one taken in Moscow where I currently live. It shows one of the hard line communist groups demonstrating in the streets of Moscow. These sorts of demonstrations last year, which ultimately led to a major

showdown between president Boris Yeltsin and the Congress, and which you might recall seeing in the news a big battle at the Parliament building when Yeltsin ordered in the tanks to fire on the Parliament to dissolve the old Parliament. These demonstrations were often quite violent, quite antiAmerican in tone. These are people who are calling for the restoration of the Soviet Union. The picture in the middle is of Vladimir Lenin, and this is just one of the groups that still hopes that the Soviet Union can [241] somehow be restored.

Q. Just very quickly, I show you what's been marked as Plaintiff's Exhibit 26, a copy of which has been shown to counsel for defendant, and I ask you if you recognize that.

A. Yes. This is a copy of the Dallas Observer from August 1991. It is a weekly published in Dallas and has one of my photographs on the front cover as well as one on the inside in the accompanying article which is called Highway to Hell. It's one of the photographs that I have included there.

MR. J. ABADY: Judge at this time I'd move 26 into evidence.

MR. MONTBACH: May I see it, your Honor? Can you identify where the one on the inside is?

THE WITNESS: Sure. The one on the inside is on page 13.

MR. MONTBACH: No objection.

THE COURT: Received without objection.

(Plaintiff's Exhibit 26 for identification was received in evidence)

THE COURT: That represents a sale by you?

THE WITNESS: It represents a sale by me through a stock agency called Impact Visuals.

Q. Bill, Mr. Montbach highlighted the fact that there are no photographs in this group from Central America. [242] Could you tell the jury why that is?

A. Because the work that I consider of the highest quality, similar to these images, I no longer have.

Q. Where are they?

A. I have a lot of what are called outtakes which are images that I don't think have the same kind of marketable quality that those do.

Q. And what happened to the best and most select images from Central America?

A. They were lost. I don't have them any more.

Q. How many were there?

A. 310.

Q. Do you have duplicates of some of the 310 that were lost?

A. Yes, some of the images that I included in the video or gave to Guidance Associates for use in the video were included in a slide show that I had done in Horace Greeley High School in Chappaqua, New York, before that time in a show about Central America. There are roughly 40 of the 310 that were in that show. Those were duplicates that were made from the originals. The originals were those that were given to Guidance so the 40 that exist in the show at the high school are duplicates.

Q. Can you explain why you can't make a print of this quality with those duplicates or what would happen if **[243]** you would try?

A. Duplicates are never as good as the original. Every time a copy is made of a slide or a photograph, it's never quite as good. You would see more grain, you would see, the picture just wouldn't have the same sharpness, clarity of detail. Normally, for publication purposes, duplicates aren't acceptable and I didn't feel it was right to use a duplicate to make an image such as these.

Q. When you say that they're not marketable, meaning that they wouldn't be salable on the market.

A. Well, yes on a long-term basis, if I were to try to market duplicates, the company I would give them to would say are these originals or are they duplicates, and I would say they are duplicates and if the company were pressed they might make use of one but they would certainly not, they would certainly want to have originals. They would require, most companies in publication would require that they only use originals for the purposes of publication.

Q. Mr. Goodman had mentioned on his testimony—

THE COURT: No, just simple questions.

Q. How were the 310 slides delivered to Guidance Associates?

THE COURT: Is that significant? It's conceded they got them. They're gone. The value that this jury will put on those 310 slides is not affected by whether they were **[244]** delivered by ox cart, kangaroo. Please just stick with the case.

MR. J. ABADY: Judge, fine. I have no interest in going into this area if the defendant corporation will stipulate that packaging is not an issue.

THE COURT: Just try your case, will you please.

MR. J. ABADY: The only reason I'm going into this is because the defendant corporation has made an issue of it, Judge.

THE COURT: They didn't make an issue of it. There's only one issue in the case. What are these things worth.

MR. J. ABADY: I agree with you completely.

Q. Bill, prior to editing and—prior to delivering the side, did you conduct an edit?

A. Yes, when we made a decision to produce the video or when I was asked for the slides to contribute to the video, I began an extensive edit. That means I looked through the larger body of work that I had amassed, which was roughly 5,000 slides over the years I lived in Central America, and I proceeded to boil them down to the best.

And then we had made an agreement that we would meet and discuss the images and from the group that I had selected we would, the original intention was to have the video be an hour long so I was trying to think of how many **[245]** images we would need to illustrate that much time. And normally, roughly 80 or as many as 120 slides per 20 minutes in a given slide show and this was going to be a video format of a slide show essentially.

So we agreed to meet at the Guidance Associate premises and make a final, final edit. In other words, I would bring in a larger group of images that I thought were acceptable and then we would together decide on how many would ultimately be used in the video itself.

Q. How long did it take you to do that edit of the 115,000 slides?

A.Well, I was working overseas, of course, at the time.

THE COURT: He just asked you how long.

A. It took roughly a year altogether. But of course I wasn't working on it full-time.

THE COURT: How much in hours did it take to do the actual editing?

A. I would say it took probably a couple of hundred

Q. Can you explain whether it is typical for editing to reduce the amount of slides to that number to get the select images?

A. Well, in doing an edit, making an edit is an extensive process. You have to go through a large number, **[246]** body of work, you have to pull out, you have to sort and organize, you have to say this covers this topic, this covers this topic.

I was also working of course on the script at the same time. I was isolating audio cuts that I had gathered in my radio work to help be sound effects in the video. To me the project was a mixing of the three media that I work in for educational purposes that I thought was very sound. I had been a former teacher, especially.

So in developing the script I would often do revisions of the script, I would look for slides that would, I thought, illustrate certain points I wanted to make and I wanted to use the best and most dramatic images and to do that it just took a lot of time.

Q. What is the typical percentage when a photographer shoots a large body of work, like several thousand images, what is the typical percentage that has a permanent marketable value?

MR. MONTBACH: Objection.

THE COURT: If he understands the question and knows the answer, I'll let him do it subject to cross-examination.

MR. MONTBACH: For him or for every photographer around?

THE COURT: I didn't frame the question. Why **[247]** don't you try again.

Q. Are you familiar with standard practices of professional photography as a professional photojournalist?

A. Yes.

Q. What is the typical percentage of the photographer's work when he makes a large shoot that has a permanent, lasting market value? What is that range?

MR. MONTBACH: Objection, your Honor.

THE COURT: I'll sustain the objection.

Q. What was the range for your work?

A. I can understand or I know that in the industry, the general rule of thumb is between 1 in 15 and 1 and 20. In other words, if you have a large body of work, such as I had, only a small percentage of those images would be useful in publication, would be useful over a long period of time and so I thought that the 300 that I worked on developing for this show were the best of my 5,000 slides. And that, to me, was a typical ratio. Some photographers would argue with that. They would say perhaps only 200. Maybe some would say 400. One in 15, one in 20. So since there were 5,000 slides roughly it was about right, the ratio.

MR. J. ABADY: Could I just have one moment, please?

(Pause)

Q. I want to talk a little bit about—

[248] THE COURT: Just frame a question. No introductions.

Q. Regarding the 300 images that were lost by the defendant corporation.

THE COURT: It was 310 last I heard. Maybe you've given up on 10.

MR. J. ABADY: I stand corrected, Judge.

Q. 310 images. Were there photographs of famous people that you took?

A. Yes.

Q. From what countries in Central America?

A. From all of the countries in Central America. Guatemala, Honduras, Nicaragua, El Salvador, Panama, Costa Rica.

Q. Would you tell the people what famous people were the subject of your photographs that the defendant lost from Nicaragua?

A. As an example, the president of Nicaragua at the time, Daniel Ortega. He was very much in the news all the time, he was a very controversial figure. President Reagan—

THE COURT: Just give us the names. Don't tell us about what President Reagan did or did not do unless you want to make this trial into a career.

A. Daniel Ortega, president of Nicaragua, the **[249]** current president of Nicaragua, Violeta Chimorzo. In Costa Rica, the former president, Oscar Arias, who was the author of the peace plan, winner of the Nobel Peace prize. All of the presidents. I attended many of the summit meetings.

THE COURT: Just answer the question. He asked you who the famous people were.

A. Fidel Castro when he came to visit Nicaragua in 1984. Manuel Antonio Noriega, former dictator of Panama. And on occasion other people who would come to visit such as the prime minister of Sweden.

Q. What were the conditions under which you took photographs, for example, of Manuel Antonio Noriega?

A. I saw Noriega a couple of occasions, one particularly when he was watching an antiAmerican play after he had annulled the elections in 1989 with various other journalists during this event, I got a very clear view of him as he sat and watched and laughed at the play. As he was leaving, everyone tried to interview him, talk to him. This is after the election.

Q. What about the presidents of Nicaragua, what were the circumstances of those photographs?

A. Well, in the case of Daniel Ortega saw him more than any of the other people because I lived in Nicaragua.Was all the time speaking in public, big rallies. Sometimes I would be somewhere in the city and I would see suddenly a **[250]** convoy of vehicles and he would show up, get out of his vehicle and shake hands with people. So I could get pictures of him there. Attending the summit meetings, both in Nicaragua and other countries and during the election campaign in 1984 and in 1990, as well as Violeta Chimorzo. I took many pictures of her during that time.

Q. What was her public office?

A. Well, she is now the president. She was elected president in 1990. That's what she is now. Up until 1990, she was just an ordinary person. She had been an original member of the government that took over in 1979 but she left after a time.

Q. In addition to the photographs of famous personages in the region, did you also travel in war zones?

A. Yes. I traveled on many, many occasions in war zones, particularly in Nicaragua and in El Salvador.

Q. Why did you travel in those areas?

A. Because this was the main story, the conflicts, what was happening in the conflicts, especially in the case of Nicaragua, the Contra rebels who would attack farming villages, cooperatives in the north of the country. We would often go up into the countryside after these attacks to document what had happened and how the people of the country were suffering to try to get to the root of what the conflict was about, who did the people in the countryside **[251]** support and why.

Q. Did you take photographs in Nicaragua in combat zones?

A. Yes.

Q. Could you tell the members of the jury what some of the circumstances were surrounding —

THE COURT: This is about the 310 now.

MR. J. ABADY: Absolutely. All these questions are about the 310 slides that were lost.

Q. Could you tell the members of the jury about the slides that you took in war zones in Nicaragua that were lost?

A. Well, one occasion that stands out is in 1985 when I was accompanied a ship, a boat that went down the river that formed the border between Nicaragua and Costa Rica with a group called Witness for Peace. The reason they came was to go to the war zone, the river at that time was a conflict area between one of the Contra groups and Sandinista soldiers and this group had the intention of going down the river to try and say, you know, stop the fighting, there should be peace.

This was a group of activists, mostly from the New York area, and I was one of several journalists that accompanied them on that trip. And we were fired on by the Contras at one point and held captive overnight. We were **[252]** led into the woods. We were there as journalists documenting this and were released the next morning by one of the commanders of the Contras who said we could go on. For a time it became a big news story because it looked like a group of Americans being held against their will in the jungle. There were many, many, many other occasions where I would go up into the war zones.

Q. Just to interrupt you for a moment with respect to that incident, the kidnaping in Nicaragua, when you said you were held against your will, what do you mean by that?

THE COURT: Are there pictures reflecting the incident?

THE WITNESS: Yes.

THE COURT: His adventures may be interesting but we're concerned about lost pictures. Are there pictures concerning this episode you've just described?

THE WITNESS: Yes.

THE COURT: How many of them?

THE WITNESS: I took several rolls.

THE COURT: How many were in that 310?

THE WITNESS: I believe six or seven.

THE COURT: Is there any particular aspect of those photographs that you remember at this time?

THE WITNESS: I remember shots of the Contras standing on the hill as the Witness for Peace people were **[253]** being led off the boat. A picture of the people holding hands as they walked off into the forest. Another one of a peasant woman as she was cooking dinner in the hut where we were held overnight.

Q. Could you give some examples of the photographs that were lost that were taken in El Salvador in combat zones in war conditions?

A. Yes. The most graphic images I have were taken in 1989 when the leftist rebels launched an offensive to try to overthrow the government. It was an extremely dangerous situation, combat throughout the city. The day after I arrived, I went out with a couple of print reporters to an area and we were stopped at an army roadblock. A few moments later some shots rang out. One of my colleagues was shot and killed.

Meanwhile there were a lot of civilians trying to leave the battle zone, further up on the hillside and they were waving white flags. I also took a picture of a dead body in the gutter. Some of these were included in the 310.

Q. Who was the journalist colleague—

A. David Lundy. He was a correspondence for a British newspaper called The Correspondent.

Q. Approximately how far were you from him when he was killed?

A. I was standing roughly ten feet away from him. [254] Later in that same time, about a week later, the Guerrilla rebels came in and seized control of the Sheraton Hotel which was in another part of the city and inadvertently trapped a group of American Green Berets inside the building and there was a standoff because the army surrounded the area and I went inside the building with other journalists to interview the Green Berets and the Guerrillas.

The Green Berets refused to have their pictures taken but I did interview some of the Guerrillas, particularly one with a mask over his face. To get into the building to leave, we had to walk through a no-man's area, waving a white flag yelling "press" so we wouldn't get shot.

Q. Was there also an incident in El Salvador where you were—

MR. MONTBACH: Objection, leading.

THE COURT: Sustained unless it's tied into the 310 missing slides. If there are slides he took in that episode he can tell us about those.

MR. J. ABADY: Every question that I'm asking—

THE COURT: That's not clear from the questions.

MR. J. ABADY: Just so it's clear, all the—

THE COURT: You can't make it clear unless you say so in the questions. Did you lose slides in the last episode you just described?

THE WITNESS: Yes, I did.

[255] THE COURT: Do you have any idea how many?

THE WITNESS: From the Sheraton Hotel incident I believe there were five.

Q. Just to clarify the record, since I began questioning you about the 300 slides and we talked about the famous personages and the different combat zones, were all of those photographs photographs that were part of the select 310 slides that were lost by the defendant corporation?

A. Yes.

Q. Was there another incident in El Salvador aside from the incident at the Sheraton Hotel, aside from the incident where the British journalist was shot next to you, where you took photographs that were of a situation in danger that were among the 300 that were lost?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. Yes, there was another time when I was in a rebel-held area of the country, in other words we passed through an army check point and were near a mountain that was under the control of the rebels and they were in control of this little highway as we went along.

And government helicopter gunships opened fire on our car, they didn't know why we were there, it was a rebel area, so we had to get out of the car and take cover in a [256] ditch. I took pictures of some of the rebels that we saw there along the road and one of the helicopters as it was flying overhead.

Q. Were those images lost?

A. Yes.

Q. Who lost them?

A. They were part of the 310 that I delivered to Guidance Associates.

Q. Were there photographs taken in dangerous circumstances in Costa Rica and in Honduras?

A. In Costa Rica, no, apart from the kidnaping incident that I mentioned earlier which was on the border of Costa Rica. In Honduras, there were some pictures of the Contra rebels in one of their base camps which was located near the Nicaraguan border and took a little bit of doing to get to. There wasn't any conflict happening at that point. It was just a camp. There was always the danger of an attack by the Sandinistas but at that point the peace process had begun.

Q. While you were traveling in Central America and with respect to the 310 slides that were lost by the defendant cor-

poration, were there circumstances where you took photographs under the escort of army troops because of safety concerns?

A. Yes. I went on patrol one time with the [257] Salvadorean military and I had pictures of troops on patrol in a jungle area. Same is true of Nicaragua. We went to the conflict areas and visited a base camp of the Sandinista army and a series of photographs taken at that time were included in the 310.

Q. Can you estimate what percentage of your photographs from Nicaragua and El Salvador were photographs taken in conflictive war zones?

A. It's hard to put a number on it.

MR. MONTBACH: Objection. Very vague.

THE COURT: He's answered. I'll let his answer stand.

Q. What other types of events did you take photographs of that were part of the 310 select images that the defendant corporation lost?

A. Well, there were a lot of what I would call human interest pictures, pictures of people going about their business, farming, in their homes, street scenes. There were landscape shots. Nicaragua is famous for very spectacular sunsets and volcanoes. So I have pictures of volcanoes, of landscape beauty.

In the case of Guatemala, it's a country of very vibrant color. The indigenous people who live in the mountains wear very, very distinctive looking clothing. And I was also in Guatemala on a number of occasions during [258] festival time, including the very famous holy week processions in Antigua, where the people lay carpets of colored sawdust on the streets and they carry the float of Jesus Christ holding his cross on Good Friday. Guatemala is an incredible place for photographic images because of that, the color there.

And then there were also political type shots.

Q. Let me ask you—

A. Rallies, etc.

Q. Before you go to rallies, just to clarify, holding up Plaintiff's Exhibit 18A which is in evidence, which is a landscape I believe from Asia, is that correct, when you talk about the landscape shots that you took in Central America, would they be shots like this which attempted to —

MR. MONTBACH: Objection.

THE COURT: It's an argumentative question. He's already been allowed to show these pictures from Asia as samples of his work and the jury may infer that the quality of his pictures is similar to the quality of the lost pictures, if they wish to draw that inference from the testimony.

Q. Is that typical of the type of landscape shot that we're talking about?

A. Yes.

[259] Q. I didn't mean to interrupt you. You were speaking about other events that you took photographs of that were among the 310 slides that were lost?

A. Political rallies, particularly in the case of Nicaragua, Sandinista rallies, people waving flags, people harvesting crops, riding in carts. Again, what I would call human interest pictures which I feel is a way to convey the way the people live in these countries and what it's all about, what their lives are all about.

Q. When you take a human interest shot in Central America, is that where your training and expertise with language and the culture come into play in selecting the image and taking the image?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. You testified earlier—

THE COURT: Whatever he testified earlier the jury heard.

MR. J. ABADY: I'll withdraw the question.

Q. Did you take pictures in Central America that were among the 310 slides that were lost by the defendant corpo-

ration that included shots in areas that were very remote or difficult to gain access to?

A. Yes.

Q. Could you describe for the jury some of those **[260]** photographs that were lost and among the 310 beginning with Nicaragua?

A. Well, the most evident example was on the Atlantic coast side of Nicaragua which is a very different region, it's a jungly, marshy kind of an area and Mosquito Indians, tens of thousands of people had been evacuated by the Sandinistas when it became a conflict zone.

There was in 1985 a peace agreement and a gradual process of these people trying to return to their villages along the river and I went along with a photographer from National Geographic and we were the only two journalists who got to the river with the people when they decided to return.

It was a very remote area. There was still the danger of rebels in that area. We had to bring a Moravian pastor and a man who is considered an elder by the Indian tribes who would command enough respect in case we were stopped by the Contras to explain why we were there and what we were doing, we were just journalists and not partisan to any part of the conflict.

The logistics in getting around in the coast, and also the mountain part, the interior, are very difficult. The roads are very bad. You have to drive through rivers. When it's the rainy season you get caught in the mud all the time. You need a four-wheel drive in most cases. Some of **[261]** those, they're not even called roads in some areas. And there are also places where I had to go on foot to go to.

THE COURT: We can break for lunch at this time. Members of the jury would you please return at two o'clock, keep an open mind, don't discuss the case.

You could step down Mr. Gasperini.

(Jury not present)

THE COURT: What is the problem with Exhibit 17?

MR. MONTBACH: I thought I had not been provided with copies of the picture but I was.

THE COURT: Then after the recess it will be received in evidence. He can point out what there is there that's his work and what is not his work.

MR. MONTBACH: I would like them to at least be tabbed.

MR. J. ABADY: They are tabbed, your Honor.

THE COURT: Even so he should explain that to jury.

MR. S. ABADY: I understand. It has been, his request has been acceded to already.

THE COURT: The court will be in recess.

(Luncheon recess)

[262] AFTERNOON SESSION

2:00 p.m.

(Jury present)

WILLIAM GASPERINI, resumed.

DIRECT EXAMINATION (Continued)
BY MR. J. ABADY:

Q. Prior to the lunch break you finished talking about Nicaragua and the photographs that you took there. Were there circumstances in Honduras where you took photographs that were part of the 300 where you also had difficulty gaining access to areas or where you were photographing images that were in remote areas?

A. Yes, in Honduras the most clear example there was the Contra camps, the camps that were maintained near the Nicaraguan border by the Contra rebels. And I went in there and saw them in formation, doing what they do in the camps at that time along with their main leader who was addressing them about the ongoing peace negotiations that were happening at the time.

And there were other occasions, out to the Atlantic coast of Honduras which is very similar to the Atlantic coast of Nicaragua, had to fly out there, hike into the jungles where the indigenous people live and some of the photographs that I took on that trip were also included.

Q. What about El Salvador, were there photographs [263] taken in remote areas of El Salvador among the 310?

A. Yes, there were some when I was on an army patrol and also in the rebel zones, the areas that were under the control of the rebels and entered into the zones on occasion and would meet with some of the rebels. They would just come out of the woods and I would talk to them and I would take a picture and we were discussing, to interview them to find out their side of the story.

Q. Still talking about the same 310 photographs?

A. Yes.

Q. What about Guatemala, can you describe to the jury photographs that were among the 310 that were taken in Guatemala in remote areas or areas difficult to gain access to?

A. In several occasions I journeyed into the heartland, into the mountains, the remote villages where they wear very vibrant colored clothing. One time for a festival that was going on. And I also went up to the famous Mayan ruins of Tecal and from there went out to visit health clinics that were being set up by the government and there was one picture in the jungle up in I believe it's called the Pétan region and there were also images of Tecal itself which is an ancient Mayan ruin.

Q. Costa Rica with respect to remoteness and difficulty to gain access, were there photographs within the [264] 310 that were from Costa Rica and were remote areas?

A. Costa Rica, no, I don't believe in terms of remoteness, not really, no.

Q. In your career as a journalist of more than ten years, eleven years, what was the area that you spent the most time in?

A. Central America has been, remains today, the area that I know best and that I lived in the longest. It's also the area that I felt most attachment to in terms of understanding the

people, I think, speaking their language very fluently, following the events and turmoil that they lived through when these conflicts were going on.

Since then I've been to the Persian Gulf, I was there for only a very finite period of time and now I'm living in Moscow, in Russia and it's a whole different reality, a whole different place to get to know. But I still feel, I'll never, I don't think I'll ever—part of me will always feel for Central America because of the time I spent there.

Q. Where was your best work done to date as a photojournalist?

A. I believe it was in Central America.

Q. You mentioned—

THE COURT: If he mentioned it we heard it.

MR. J. ABADY: I apologize, Judge.

[265] Q. What is the difference between the several thousand outtakes that are still in existence and the select images? Can you explain to the jury—

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Do you have any slides, are there any slides left from Central America?

A. Yes, there are.

Q. Approximately how many images are there?

A. Over 4,000.

Q. What is the difference between those images and the select images?

MR. MONTBACH: Objection.

THE COURT: I think he's answered that already, hasn't he?

MR. J. ABADY: I don't think so, Judge, with the level of detail.

THE COURT: Overruled, let him answer.

Q. Can you explain to the jury what it takes to get that image?

MR. MONTBACH: Objection, that's a different question, your Honor.

THE COURT: Sustained.

MR. S. ABADY: Have the reporter read back the prior question.

[266] THE COURT: No readbacks.

Q. Could you explain the difference between those images and the 310 lost by the defendant?

A. The ones that are still in existence are what are called outtakes.

THE COURT: This has all been explained before lunch. He picked the best 310 of the Central American materials. That's what he said. Didn't he say that?

MR. MONTBACH: He picked the best 300, he said. He did no pick 310.

A. The 10 extra were provided by my mother.

MR. MONTBACH:There's no testimony to that.

THE COURT: I thought that had been testified to also. The jury's recollection of what's been gone over will control.

MR. J. ABADY: I'm confused now as to whether he's going to be permitted to complete the answer or not.

THE COURT: Frame a new question. He told us these were outtakes. The jury understood him I'm sure. Please don't replicate material already presented.

MR. J. ABADY: I think that's going to be issue.

THE COURT: I think some day we're going to finish this trial.

MR. J. ABADY: I think we will, Judge.

THE COURT: Please frame the next question.

[267] Q. What would you have done with the 310 images, what were your plans in terms of using them over the course of your life if you still had them, what would you be doing with them?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. I had many thoughts about what I would do with them.

THE COURT: Plans, not thoughts.

A. Plans. I had many plans. After the edit that I did, I selected the best in terms of the composition of the slide, in terms of the color, in terms of the images conveyed, etc. I had planned to write a book and sum up all of my experiences in Central America using the slides to illustrate.

I felt, my original goal of going to Central America had been partially fulfilled by the Guidance video and by the other uses to which those images and some other images had been put but I felt it was important to convey again to the American public to have a fuller understanding of the region and once I was through with the book, I would have put them in a stock agency. And I have no doubt that they would have had use value long into the future.

Q. Aside from writing—can you clarify what kind of book it was that you were going to, that you planned to [268] use those slides for?

A. A retrospective on my experiences in Central America. I had thought of writing an anecdotal book. I knew there were a lot of books on the market that dealt with political questions, economic questions, why there was poverty, that kind of thing. I thought the people who had followed the news events throughout the 1980s would be very interested in knowing the anecdotal kind of things that happened, the experiences that I lived through and to do that I would obviously want to illustrate in a very detailed way using the images to say this is what this region is all about, this is what I saw through my own eyes and lenses, and this is what I want to convey to you, people who have never had a chance to go to the region or fully understand it.

Q. In addition to writing the book and placing the images in stock houses, what were other plans that you had with respect to how you were going to market these slides?

MR. MONTBACH: Objection, leading.

THE COURT: It is leading.

Q. What other plans did you have with respect to the slides?

MR. MONTBACH: Objection, leading.

THE COURT: Well, if he had other plans he can tell us.

[269] A. I had plans to market them for CD ROM use, in the burgeoning world of computers. And there is really no limit to the uses that they could have been put to I don't think. Different kinds of technologies that now exist that didn't eleven years ago when I started to take the pictures then.

Q. What does it mean to your career, Bill, that you no longer have the 310 slides?

MR. MONTBACH: Objection.

THE COURT: If he understands the question he can answer it.

A. I find it difficult to state actually what it means. I approached the project from the beginning thinking well I knew my time in the region was coming to a close. I thought this would be an initial use that the slides could be put to. I thought it was a very worthwhile project, create the video, have it available to students throughout the country. But it was only first step, it was only to lead on to other things.

I think of all the places that I have lived and worked in my career, Central America is the one that still means the most to me and to have lost the best images that I took over a long period of time is a devastating kind of blow. And it can affect me long into the future. And again, I find it hard to express exactly how I felt about it at the time and I still feel about it today.

[270] Q. Is it possible for you to return to the region and take images and replace what you lost?

A. I don't believe so, no. Partly because the situation has changed dramatically from the time that I lived there. Obviously the slides that portray the drama, the war, the conflicts are historical and circumstances that probably will not be repeated, at least in my lifetime.

It's hard to say but I don't, even if the conflicts were to begin again or there were to be a new phase of the turmoil that has plagued the region for a long time, I don't know, I'm reaching a stage where I'm unwilling to take the same kind of risks that I did ten years ago. I don't particularly like being under fire. That's why I tried since I've been in the Eastern European region to avoid going to cover the conflict in Bosnia because I don't find it a very appealing prospect to go into war zones again.

I think you take one risk too many, and you're gone. And I doubt that I will want to become a war correspondent. I'm reaching an age, too, where ultimately I want to come back to the United States to settle. I have plans to use these images in the future for other purposes and also to go back to all these places in remote regions that I've been to. You can never recreate what you've already created.

[271] MR. J. ABADY: Judge, one moment, please?

(Pause)

MR. J. ABADY: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Gasperini, you testified you went to—

THE COURT: Whatever he testified—

Q. You started your career—

THE COURT: You're not going to have any more stuff like that that repeats. Rule 403. Frame a simple question, something important.

Q. You started taking pictures in 1984 in Central America, correct?

A. Correct.

Q. Did you start selling your pictures in 1984?

A. I believe the first sale was to In These Times in that year, yes.

Q. How much did you earn in 1984 from the sale of your photographs?

A. Just a couple of hundred dollars.

Q. And were you selling your photographs in 1985?

A. There were occasional sales in 1985, yes.

Q. And how much did you earn from the sale of your photographs in 1985?

[272] A. Again, it was just a couple of hundred dollars.

Q. And this was at $50 or so, maybe a little bit more, per photograph?

A. Yes.

Q. Are those photographs shown in the two exhibits that have been marked I think it was 17A and B, the two loose-leaf—

A. Yes, some of them are accompanying the articles that I sent into In These Times. There are also two in the Winnipeg Free Press in Canada. Those I can recall right now.

Q. The ones that were in In These Times, did you ever have anyone request the use of those photographs again from 1984 on?

A. No.

Q. The ones that were in the Winnipeg Free Press, did you ever have anyone ask to use those photographs again from 1984 on through the present time?

A. One of those photographs was also used in In These Times. And one of the photographs Reuter's had a look at it. They were considering using it but they did not.

Q. And you say In These Times used one of the photographs that was used in the Winnipeg Free Press?

A. I can't remember who used it first but it was one or the other.

[273] Q. And each of them paid about $50 one-time use?

A. Yes.

Q. And those photographs, do you still have them now?

A. Yes.

Q. They're in the 4700 you have at home or they're here, right?

A. Yes.

Q. Did you ever market those in any way?

A. No. I made the choice not to have them put into a stock agency at that time. In the mid 80s when I began, I would offer the photographs to a particular publication that would request them or particularly in the case of the Atlantic coast or some of the remote regions I had gone to, if they felt they didn't have access to photographs of that region or that particular event, then I would offer it to them.

THE COURT: Your answer is no. When you can truthfully answer no, limit your answer to no and not anything else.

Q. How did you come to, in a typical situation for these newspapers that you were writing for, you were doing radio journalism at the same time, correct?

A. Yes.

Q. When you're writing for newspapers, was that **[274]** because you were employed by the newspaper or were you a freelancer submitting proposals to them?

A. In the beginning I was a freelancer. I would offer stories to them or they would contact me or they would say, they would say we're interested in this topic.

Q. And would they ask you, when they asked you about the topic, to go out and take pictures of that topic?

A. In the case of In These Times, yes. On occasion when I went to areas they said can you get photos to go with the story and I would say yes.

Q. Didn't you testify during your deposition, sir, that you would say to them, I have some photos, are you interested in them?

A. That would happen on occasion and there were times with In These Times when they would ask.

Q. And any of the photographs that you supplied to In These Times, were they included in the photographs that were given to Guidance Associates?

A. There were several that were from the return to the river, the Mosquito Indians.

Q. That return to the river, you said you went there with another journalist, is that correct?

A. That's correct.

Q. Was that a photojournalist?

A. That's correct.

[275] Q. Who was that?

A. His name was James Nachtway. At the time he was on contract with National Geographic to do a story about Nicaragua in general.

Q. Did he ever do that story about Nicaragua in general?

A. He did.

Q. Did you ever see that story about Nicaragua in general?

A. I did.

Q. He's a professional photojournalist, is that correct?

A. He is.

THE COURT: Asked and answered.

Q. I show you a copy of this November 1985 National Geographic.

MR. S. ABADY: May we see it, your Honor?

Q. And I ask you to look through it and tell us if those are the photographs taken by James Nachtway when he was with you?

A. There are two there of the Atlantic coast. One of them was taken when I was with him. The other is taken by the man who wrote the article.

Q. Are these photographs taken while you were with Mr. Nachtway or when Mr. Nachtway was the same place as you [276] were?

A. As I said, there's one photograph in here that was taken when I was with him.

Q. Which photograph is that?

A. The others were taken over the months that he was spending in the country in general.

Q. Which photograph was taken when you were with him?

A. This one.

Q. Referring to the photograph of a fisherman?

A. Possibly this one too.

Q. Were you with him when that picture—

A. That was taken by Mr. Edwards. But I took a similar picture in the same place. It's the ruins in the church in Waspam.

Q. The similar picture that you took, was that among the pictures that were given to Guidance Associates?

A. I believe—no, I don't believe so, no.

MR. MONTBACH: I would ask this be admitted in evidence, your Honor.

THE COURT: Received no objection.

(Defendant's Exhibit Q for identification was received in evidence)

Q. Nachtway was with you on the return to the river trip?

[277] MR. S. ABADY: Objection, asked and answered.

A. He was with me on part of that trip. I went up to the river actually twice, once with him, once by myself days later, when he had already returned to Managua and I went up by myself.

Q. In 1986, how much did you earn from the sale of pictures taken, you took in Central America?

A. I'd say it was less than $500.

Q. Around the $200 figure you had given before?

A. Roughly, yes.

Q. During those years, how much did you spend on supplies for photography each year?

MR. S. ABADY: Objection as to relevance, your Honor. How much he spent on supplies?

THE COURT: For all those pictures?

MR. MONTBACH: Yes.

THE COURT: I'll allow it.

A. Several hundred dollars.

Q. A year?

A. I would buy film. I had the equipment already because I had used it before and then occasionally I had to replace something that wore out because of the climatic conditions.

Q. Pay for processing?

A. Yes.

[278] Q. In 1987, how much did you earn from the sale or use of pictures you took in Central America?

A. I earned approximately $2500.

Q. And what was that made up from?

A. It was made up primarily from the use of the images in this program.

Q. You received $2,000 for the images used for 15 pictures used in that program?

A. That's right.

Q. How many pictures—you did an edit before you gave the pictures?

A. Yes.

Q. Were those your best pictures at that time?

A. Among them, yes.

Q. How many of those did you give to the video game people?

A. Approximately 40.

Q. And they used 15?

A. Correct.

Q. And did you get everything back?

A. Yes.

Q. Were any of those 40 among the ones given to Guidance Associates?

A. Yes.

Q. Were all the 40 given to Guidance Associates?

[279] A. No.

Q. How many of the 40 were given to Guidance Associates?

A. I don't recall.

Q. What has happened to the remaining number that were not given to Guidance Associates?

A. I still have them.

Q. Did you ever receive a request after the video game came out from anyone, any publishing house, any magazine, any video, any CD ROM people, to use the pictures that were found in the video game?

A. No.

Q. Did you ever put any of the pictures up until 1987 that you took with any stock house?

A. No.

Q. Did you approach anyone to use, other than the newspapers and the video game people, to sell the use of your pictures during that time period?

A. After 1987?

Q. Up through 1987.

A. No, I did not put them in a stock house.

Q. Did you market them in any other manner?

A. Apart from the CD ROM application and occasional sales to newspapers?

Q. That's right.

[280] A. No. Excuse me, I put together a slide show that was used by Horace Greeley High School. And in 1987 I also put together a series of slide shows on my trip in Asia, travels in Asia. And I received a grant to do that.

Q. The Horace Greeley High School slide show, did you charge them for that?

A. I received a grant for it.

Q. I'm talking about the Horace Greeley Central America slide show?

A. No, that was pro bono.

Q. That was a pro bono thing?

Q. Yes.

Q. When did you put that together?

A. 1986.

Q. And how long did it take you to put that together?

A. The slide show?

Q. Yes.

A. It took me a couple of days.

Q. And how many slides were in the slide show?

A. About 120.

Q. And did you go through the same editing process to provide them with your best up to that date of pictures from Central America?

A. Well, the number I had taken up to that point was **[281]** much less so the process wasn't as tedious or drawn out. I had only been in the region a couple of years.

Q. You had been in the region for approximately three and a half, four years at that time, 1984, 1985, 1986 and part of 1987?

A. No. I put the show together at the beginning or the end of 1985 and it was finished in the spring of 1986 so it was a total of about two years.

Q. But you did go through the editing process?

A. Yes.

Q. And you thought the 120 that you gave to the high school were the best of the ones available at that time?

A. I gave them duplicates of those and I thought they were the best, yes.

Q. Did you give them duplicates originally or did you give them the originals first and then subsequently give them duplicates?

A. I gave them duplicates when the teachers asked me. It started when I went to the school to give a presentation, to talk to the students. And I had to give a lecture about Central America. And then afterwards, they asked me, that was great, we loved it.

I spent a whole day at the school talking about Central America. They said we'd love to get a version of this with an audiotape so that we can use this when you're **[282]** not here. Because I only would come up once a year on average for a short vacation or whatever it was. And they said we'd love to be able to have this on hand as a teaching tool, as an

aid. And that was in fact one of the reasons how the whole idea of doing a show for Guidance Associates began.

Q. How did you come into contact with Horace Greeley High School?

THE COURT: Does that really matter?

MR. MONTBACH: I think so.

THE COURT: I don't. We have to get down to the value of the lost slides. It wouldn't matter if he met the principal on the street, he happened to live there, he went down and volunteered, somebody in the PTA met him on the street. It doesn't matter.

Q. Your mother is the secretary of the history department there—

THE COURT: No more about the Chappaqua high school. You're trying to circumvent my last ruling.

MR. MONTBACH: No, I'm not, your Honor.

THE COURT: You want them to infer that his mother got him the job. No more.

Q. Now, you gave 120 slides to the high school, is that correct?

A. Yes.

THE COURT: Asked and answered.

Q. Sir, I show you what's been marked as Defendant's Exhibit M and I ask you if these are copies of the 120 slides that were given to the high school?

A. I'd have to look through all of them.

THE COURT: No, you don't.

MR. MONTBACH: Just take a look at samples.

THE COURT: No more on the high school. Unless you're intending to offer the slides. If you're intending—

MR. MONTBACH: I'm intending to offer the slide.

THE COURT: Then you'll have to produce a slide projector.

MR. S. ABADY: We would object anyway. These are duplicates, not originals.

THE COURT: Sustained. That doesn't matter but he has no slide projector and the jury can't see it. Just put them away, would you please.

Next question.

Q. Sir, of the 120 slides which you gave to the high school and the originals of those, how many of those originals did you give to Guidance Associates?

MR. S. ABADY: Objection, he did not testify he ever gave originals to the high school. That's a mischaracterization of the testimony.

[283] THE COURT: It is a mischaracterization.

Q. If I said gave the originals to the high school I withdraw that.

THE COURT: He said they asked for copies.

MR. MONTBACH: And I said the copies. Let me rephrase the whole question, please.

Q. Sir, of the 120 slides that you, which you gave duplicates of to the high school and you had the originals in your own possession after that, correct?

A. That's correct.

Q. Did you give any of those, submit any of those to Guidance Associates?

A. Yes.

Q. How many?

A. I'd have to refresh my memory. I believe it was close to a hundred.

Q. Close to a hundred of the slides which you gave to the high school were also given to Guidance Associates?

A. I believe so, yes. Perhaps it was 80, 75. I don't recall the exact number.

MR. MONTBACH: Your Honor, will you permit me to have him check those slides.

THE COURT: No, he said he gave a hundred. That's the testimony. I would admit the slides in evidence providing they were accompanied by a device to allow the **[285]** jury to see them. But I don't think the jurors should be required to hold them up one-by-one against the window.

MR. MONTBACH: I will purchase a viewer tonight and bring it in tomorrow.

MR. S. ABADY: We would object—

THE COURT: It allows them to see the general nature of his work.

MR. S. ABADY: I think after you hear the expert testimony you may want to revisit that ruling.

THE COURT: No. If you want to do that I'll receive these copies in evidence. The jurors have to understand they're copies, they're not the originals and therefore the quality may be less.

(Defendant's Exhibit N for identification was received in evidence)

Q. Of the slides which you gave the copies of to the high school that you did not give to Guidance Associates, what have you done with those, if anything?

A. I believe I still have them in my files.

Q. Have you done anything to market them?

A. No. Not to date.

Q. Why not?

A. Because of what I said before. I made the conscious decision to amass a body of work over the time I lived in Central America. It was not feasible for me to **[286]** engage in constantly contacting a stock agency and I had limited time when I came up here from the region. I was busily involved in the process of reporting and working in Central America and I decided that I would hold the slides for later use.

Q. When later?

A. That was undetermined.

Q. In the future past today, past 1994?

A. In the future. When I come back to the United States to live. I hadn't reached a concrete decision on that. But I deliberately did not place images with the stock agency back in the 1980s.

Q. What about the late 1980s, you deliberately didn't put any stock pictures of Central America with any stock agencies?

A. Yes, that's right.

Q. And in the early 90s, 1990, 1991?

A. I did after that. During the Gulf War, a lot of the shots that I took were sent here. My brother did a preliminary edit, took them to Impact Visuals. They did the bulk of the edit.

That's an illustration of the problem that I had. I was always overseas. To do it properly I should have come back to do it. As it is, they were burdened to do it. It was of great interest to them to have images of the Gulf War [287] so they did the edit. But it's not the proper way to do it. Normally the photographer has to develop the film, has to look at it. Unless you're on a contract with a magazine where you send the roll of film and the magazine takes it from there. In my case that wasn't the case.

Q. With the Impact Visual Gulf pictures, and you've shown us two of them, how many did they, were they presented with, Impact Visuals, by your brother, how many did he submit to them?

THE COURT: We're talking about the Gulf War now?

MR. MONTBACH: Yes, with the stock house Impact Visuals.

A. I don't recall but I believe it was 50 rolls.

Q. 50 rolls of 36 shots?

A. Yes.

Q. 1500, 1800 slides?

A. Approximately.

MR. S. ABADY: That would be 1800.

A. Actually it was more like that. It was more like 75. I remember him telling me this incredible burden you've saddled on me. It was sort of unfair to him actually.

Q. Did he edit them down and then give them to Impact Visuals?

A. He gathered them together. I talked to him on the phone, explained roughly what they were and he, all he [288] did really was order the boxes. He looked through a box and he says this comes from, it seems this comes from, he couldn't tell very well. So Impact Visuals had to do the main edit.

Q. Do you know how many Impact Visuals kept of your pictures?

A. I believe they kept a couple of hundred, maybe 250, something like that.

Q. And when was this done?

A. This was done in the spring of 1991, while I was still in the Gulf. Spring or early summer, I believe.

Q. You identified two pictures that Impact Visuals was able to market for you, is that correct?

A. One of them in there they marketed, it was on the front cover of the Dallas Observer.

Q. The other one was inside the Dallas Observer?

A. No. The other one is the oil fire. There is another one that is in the Dallas Observer that they marketed along with the one on the cover. And the other one that's in there, that one, of the fire, was taken, that was actually taken in August.

Q. Impact Visuals was able to market two of your pictures from the Gulf of the 240 to the Dallas Observer, correct?

A. Yes.

[289] Q. Were they able to market any other of your pictures?

A. Yes. I believe they marketed six, seven, eight, something like that.

Q. Isn't it true they were only able to market over the three-year period between 1991 and 1993 seven of your pictures?

A. That could be, yes.

Q. Sir, I show you a document which was produced by your counsel and Impact Visuals and I ask you if you can identify those documents which I have marked as Defendant's Exhibit K.

THE COURT: Is there an open question?

MR. MONTBACH: I'm having him look at this.

A. Yes, these are the payment vouchers and statements of sales by Impact Visuals.

Q. When Impact Visuals sold one of your pictures, what percentage of their sales price would you receive?

A. Half.

Q. Isn't it true that you received 40 percent?

A. No. Right here it says total received was 170 and I received 68. That's half.

Q. That's 40 percent. Half of 170 is 85.

MR. S. ABADY: We'll stipulate the jury can do the math and that the figures speak for themselves.

[290] THE COURT: If the witness was wrong, the attorney can correct him.

Q. I don't have the number of the oil fire in this group of pictures that was marked, with the tank in the front and the burning oil well on the back, that's the one that's on the front cover of the Dallas Observer?

A. Yes.

THE COURT: Hasn't that been asked and answered.

MR. MONTBACH: I'm leading into the next question, your Honor.

THE COURT: Don't repeat things.

Q. Is that described on the invoice of November 19, 1991, as "close tank with burning oil well?"

A. Yes.

Q. How much was the Dallas Observer charged for that picture?

A. $175.

Q. How much would you receive from that $175?

A. It's not clear on this because it was, both of the images that were used. The other one was for 75, the total was 250 and I received a hundred of that.

Q. For the two pictures, one on the cover and one inside the Dallas Observer, you received one hundred dollars?

A. Yes.

[291] Q. And those pictures have never been reused, remarketed by Impact Visuals since then?

A. As far as I know, no.

Q. When was the last time you received a payment from Impact Visuals for the use of your Gulf pictures?

A. I believe it was sometime last year.

Q. What are their payment periods?

A. Every six months.

Q. Have you received a payment for the last six-month period?

A. No.

Q. Then they haven't been able to resell any of your pictures of the Gulf War for the last six months?

MR. S. ABADY: Objection, calls for speculation.

THE COURT: If he knows.

A. No.

MR. MONTBACH: I request that Exhibit K be admitted in evidence, your Honor.

MR. S. ABADY: No objection, your Honor.

THE COURT: Received without objection.

(Defendant's Exhibit K for identification was received in evidence)

Q. The picture identified here of the Gulf War, is that with Impact Visuals?

A. I believe it is. I'm not sure.

[292] Q. Has that had any sales at Impact Visuals?

A. As far as I know, no.

Q. Has it had sales anywhere else?

A. No.

Q. In 1988, how much did you earn from the sales or use of your photography?

A. I believe it was roughly $1500.

Q. Did what did that consist of?

A. Close to 2,000, actually. Between 1500 and 2,000.

Q. Was that the slide show you were talking about?

A. That was the grant and honorarium and I believe there were a couple of sales to newspapers too.

Q. A couple of sales to newspapers of what types of pictures, Asia or Central America?

A. Central America.

Q. How much did you earn in that year from Central America pictures alone?

A. I can't quantify it. I don't know. I don't recall.

Q. You received 1500 to $2,000 for the Asia grant?

A. The grant was for 1500. And then there were extra expenses for the duplicating. Of the sales of Central American images it would have been a few hundred dollars, probably.

[293] Q. And going back to 1987, the only sales, you had about $500 outside the video game and that $500 was all Central America or was that something else?

A. In what year?

Q. 1987. You told us about the $2,000 for the video game and you gave a figure of $2500. What did that other $500 consist of, what type of pictures?

A. It was a few hundred dollars and I believe it was for other sales of pictures. I think I wrote an article about Tibet

for In These Times and there were two photographs with that. And I think there were a couple of others. They were Asia pictures.

Q. Over and above the video game money the sales in 1987 were Asia pictures?

A. Yes. I spent most of the year in Asia. I wasn't in Central America that year until the very end.

Q. 1989, how much money did you earn from the sale of your photography?

A. It would have been less than $500.

Q. And how much of that would have been from the sale of photography from Central America?

A. That would have been all of it. I don't believe there were any sales of Asian pictures that year.

Q. There was no demand for your Asian pictures?

A. Not beyond what I already provided, no.

[294] Q. 1990?

A. I also did not place the Asian pictures in the stock agency as well.

Q. Why not?

A. Because I had other plans for them. I didn't feel—I hadn't established a relationship with the stock agency at that point.

Q. You have a relationship with Impact Visuals now, have you given them any of your Asian pictures?

A. No.

Q. Have you given them any of your Central American pictures?

A. No.

Q. Have you approached them to give them any of your Central American pictures?

A. No.

MR. S. ABADY: Objection. Those pictures were lost by the defendant. He can't give—

THE COURT: Objection sustained on the ground of waste of time. Don't make statements.

Q. In 1990, what were your earnings from photography, the sales or use of pictures you took?

A. Again, it would have been less than $500.

Q. Is that solely from the sale and use of Central American photography?

[295] A. Yes.

Q. In 1991, that was when you finished the video, is that correct?

A. Correct.

Q. Finished your part of the video. How much did you earn that year from the sale or use of your photography?

A. That was the year I first, I believe I received the first royalty payments from Guidance.

Q. Do you have copies—

A. And there were sales from Impact Visuals, too.

Q. Do you know today how much the first royalty payment was—

THE COURT: If there's papers just introduce the papers, because this is taking too long year by year. We're only up to 1991. Just introduce the royalty papers and read from them to the jury how much he got.

MR. S. ABADY: They've already been admitted in evidence, your Honor.

THE COURT: If they're in evidence, read the number. I don't want to waste time with this year by year interrogation. If you care, read the number and move on.

MR. MONTBACH: A complete set was not introduced in evidence, your Honor.

THE COURT: Offer the rest.

MR. S. ABADY: Those that were turned over to us **[296]** at discovery were.

THE COURT: No more discussions like that on the record. Just offer it in evidence and move along.

MR. MONTBACH: I'll mark these later on.

Q. I show you five documents and ask you if these refresh your recollection as to payments you received in connection with the royalty.

THE COURT: Offer them in evidence and read it to the jury.

MR. MONTBACH: I'd like to call those Exhibit AA.

THE COURT: Exhibit AA is received in evidence.

(Defendant's Exhibit AA for identification was received in evidence)

THE COURT: If you care about the number, read the number from the exhibit to the jury. If you don't please frame your next question in cross-examination.

Q. In October 17, 1991, were you given a check in the amount of—

THE COURT: You were told by me how to do this. You do it my way or don't.

MR. MONTBACH: I'll be happy to do it your way. October 17, 1991, $128.40. April 16, 1992, $141.07. October 15, 1992, $103.19. April 15, 1993, $71.74. October 14, 1993, $107.28.

Q. Have you received any royalties since then, sir?

[297] A. Not to my knowledge.

Q. And you received the $3500 payment?

A. Yes.

Q. In 1991, how much did you receive from the sale or use of your photography of Central America?

A. Exclusively Central America.

Q. Central America.

A. Whatever I received from Guidance that was it. Because I was already gone from Central America at that time.

Q. I understand you were gone from Central America. I asked you from the sale or use of the pictures you took in Central America?

MR. S. ABADY: Objection, he answered the question.

THE COURT: I thought he answered the question. The numbers have just been read to the jury.

Q. And you received $92 from Impact Visuals that year?
A. I believe so. I'd have to look at this to recall.
Q. Last year, how much did you earn from the sale or use of your pictures of Central America?
A. Again, just what I would have received from Guidance Associates.

[298] MR. S. ABADY: I object to the question as misleading since he doesn't have those pictures any more. He couldn't possibly get royalties from anyplace but the defendant.

THE COURT: I'm not commenting on that. I've tried to get the matters before the jury as promptly and as fairly as I can and I don't believe I'm getting the full cooperation and support that I should be getting from either attorney. Now just complete the cross examination of this witness and we'll move the trial along. And I don't want any more comments of that sort in front of the jury. Just frame the next question.

MR. MONTBACH: Yes, your Honor.

Q. Sir, you gave 300 slides to Guidance Associates, you're suing for 310 slides. How did the other 10 slides get to Guidance Associates?
A. They were given to Guidance Associates by my mother.
Q. Did you pick out those pictures?
A. No, I did not.
Q. Do you have a list of what those pictures contain, represent?
A. No, I was overseas at the time.
Q. Did your mother make a list for you—

THE COURT: She was here and testified. You [299] could have asked her if you cared.

MR. MONTBACH: She said she didn't give any pictures, your Honor.

THE COURT: Somebody gave them as I understand it.

MR. S. ABADY: Your Honor—

THE COURT: Sustained.

Q. Do you have a list of what those ten pictures consist of?

THE COURT: Asked and answered.

Q. You've given us a list in your answers to interrogatories of the 300 pictures which you gave to them. I don't want to spend a lot of time, your Honor, but I have to ask these questions.

THE COURT: Ask the next question.

Q. When you were in Nicaragua taking pictures, were there other photojournalists with you at the time you were taking the pictures?

MR. S. ABADY: Objection as to relevance.

THE COURT: It's probably relevant to show that other people have pictures of Nicaragua. Sometimes there were, sometimes there weren't. Use your common sense.

A. Exactly. Sometimes there were, sometimes there weren't. Usually there were.
Q. Usually there were?
[300] A. There were trips I took into the mountains where I was by myself or with one other person. There were other times when there were hundreds of journalists present. During the summit meetings for example.
Q. When there were pictures of all these people that were listed, the famous people, is that correct? There were dozens, as you said hundreds of journalists?
A. Only on occasion. For example, if Daniel Ortega took a press conference, there were always photographers present. That's just common sense. There were other times when I would see him as he got out of his vehicle, I remember one time early on that he went to visit a neighborhood in Managua

and I was there and there were not that many photographers present. But usually he would attract a lot of people present.

Q. You listed pictures, two of which were in the video, taken in May of 1986 of Oscar Arias. There were other photographers present there, right?

Q. You listed two pictures of Daniel Ortega taken during the summit, you said others were there, is that correct?

A. Yes.

Q. Two taken of Daniel Ortega during the historic February election campaign—

[301] MR. S. ABADY: Objection. He doesn't own the copyright to anybody else's pictures.

MR. MONTBACH: This goes to uniqueness of his pictures.

THE COURT: The witness has already told you that for many of these scenes there were other pictures taken by other photographers of the same people or the same places or the same events. He's told you that. Even if he did not tell you that, their common sense would tell them that. The jurors would know that.

Why must we have this inch-by-inch demonstration of what is obvious. If there's a list of the pictures and you want to introduce the list of the pictures in evidence, the jurors can determine how likely it is that similar pictures exist or don't exist.

MR. MONTBACH: I don't know if that's true, your Honor. I think I have a right to ask him this question.

THE COURT: I think I have a right to tell you not to. Waste of time.

MR. MONTBACH: Your Honor, I respectfully—

THE COURT: Just a waste of time. If you want to introduce the list of the pictures you can certainly do that.

MR. MONTBACH: I do not want to introduce the list of the pictures, your Honor.

[302] THE COURT: All right.

Q. When you were on the Witness for Peace trip, I'll limit it to a few places, your Honor, how many other photographers were there?

THE COURT: I made a ruling. I'm going to adhere to my ruling.

MR. MONTBACH: Oh, your Honor.

THE COURT: That's right.

MR. MONTBACH: I respectfully except, your Honor.

THE COURT: You have an exception.

Q. In the years while your slides were being stored up until today's date, up until the time that the loss occurred, excuse me, did you ever have anyone give you an appraisal of the value of those slides?

A. No.

Q. Now this book that you testified you would like to write eventually, have you started it?

A. No.

Q. How many pictures were you going to use in the book?

A. That would be determined by the projected length.

Q. Have you approached anyone about publishing it?

A. No.

Q. Have you done any marketing research to find out if there would be any demand for this book?

[303] A. No.

Q. Is there any reason why you can't use any of the 4700 remaining photos you have in that book?

A. They are not the kind of pictures that are salable in the long run. They're outtakes. I would not consider them to be of top quality that I would want to have in a book.

Q. When you take a picture, when you took pictures down in Central America of a particular scene, would you take only one picture of that scene?

A. No. I frequently would take many pictures.

Q. And those are in the outtakes?

A. Yes.

Q. And there are other photojournalists by you taking pictures at the same time?

A. Frequently, yes. The thing about taking a top quality picture, a lot of elements have to come together, the composition, the color, the lighting, the subject matter, the point of view, the angle, the lens you're using. You could take a whole roll and only one or two out of the whole roll are really worth publishing. That's why you have to take a large volume, that's why I have thousands of slides that are outtakes.

Q. Have you had anyone look at those outtakes to determine whether they can be used for any purpose, not just [304] your book but for any purpose on the market of slides?

A. Any outside agent?

Q. Outside agent, stock agency, anyone?

A. No, I haven't.

Q. Do you advertise yourself as a photojournalist?

A. I call myself a journalist.

Q. Have you ever taken any advertisements to sell any of your pictures?

A. Public advertisement? No.

Q. Have you ever shown your pictures taken from 1984 on in Central America at any galleries?

A. Yes.

Q. When?

A. I had four pictures that were exhibited in 1984 at a special exhibition in San Francisco.

Q. Since then have any of your pictures ever been in a gallery showing?

A. No.

Q. Do you have an agent for the sale of your pictures?

A. Apart from Impact Visuals for the Gulf War slides, no.

Q. Are you a member of any photographic organizations, professional photographers organizations?

A. No.

[305] Q. What professional organizations are you a member of?

MR. S. ABADY: Objection, your Honor. How is it relevant if he's not a member.

THE COURT: I suppose he means having to do with his work.

Q. With regard to your work, certainly.

A. In Nicaragua I was a member of the Foreign Press Association. It was a club, we called it an international press club. Currently in Russia I'm a member of, there's a press club there too but I'm like an associate member.

Q. Are you a member of the National Writers Union?

A. Yes.

Q. Have you ever taught anyone how to take photographs?

A. I have been with people whom I have given advice to on taking photographs, yes. Not taught in the formal sense, no.

Q. When you stated you learned a lot in Central America from top quality photographers who were with you, who were they?

A. James Nachtway, William Gentile, he was on contract for Newsweek through most of the 80s in Central America, Lou Damatais, who was the bureau chief for Reuter's. Those were the three that come to mind right now.

[306] Q. In These Times used your pictures. Did they also pictures from other people?

A. Yes.

Q. Did they use them to illustrate your stories?

A. On occasion, yes.

Q. What about Christian Science Monitor?

A. Yes.

Q. Did they ever use your pictures?

A. Yes.

Q. Of Central America?

A. No. Not to my knowledge.

Q. Did they use other pictures to illustrate your stories?

A. Christian Science Monitor is somewhat unique that they, unless absolutely necessary, they use pictures that have been taken by their own staff photographers who they send periodically to gather stock for their own use.

Q. Did they have staff photographers in Central America at the time you were there?

A. They had people who came through on occasion but they never maintained anyone there and occasionally they would pick up a wire picture when they didn't have a stock picture in stock, from one of the agencies.

Q. Has anyone ever approached you to write a retrospective of your experiences in Central America?

[307] A. There have been many people who have encouraged me to write a book. Often when I tell stories of what I went through they say that's fascinating, that's something I hadn't heard before. You should write a book. I heard that. Even today I hear that.

Q. Anyone in the publishing industry?

A. There are people that I do know—well, no one who was suggested formally that I write a book. But people who have said that sounds like a great book idea.

Q. You have your slides at Impact Visuals. Are you a member of Impact Visual or just a contributor?

A. Contributor.

Q. Is there a difference between a member and a contributor?

A. Yes.

Q. What is the difference?

A. A contributor is someone who sends in material and they market it for you. A member is a more formal kind of a thing where you are a formal member, you are like on a contract with them, not a contract, but you're a part of their network.

Q. And isn't it true that a member gets a 50 percent share of the sale of their goods rather than 40 percent?

A. That's true, yes.

Q. Why didn't you become a member?

[308] A. Because I was living overseas. To become a member you have to put together an extensive portfolio and go through a fairly long process of discussing. I'm still at a stage where I don't feel that I can actively contribute to a stock agency on a regular basis and to do that, become a member, I would have had to have done an edit of everything I've done to date and gone through that process. And I'm only in the United States for a few weeks each year. I'm overseas all the time and it's difficult from a distance to change that kind of relationship.

Q. Isn't it true that most print journalists carry a camera with them and radio journalists when they're covering topics overseas?

A. I wouldn't say that most do, no.

Q. A good number of them do?

A. Some do. Particularly when they're going to an area where they're going to do a feature story for example. You'll see sometimes in the New York Times a story about a village and the same person who wrote the story has also taken the picture.

Q. Mr. Nachtway was a war correspondent, wasn't he?

THE COURT: Asked and answered. We've had that. Frame another question.

MR. MONTBACH: Your Honor, I would like to offer into evidence a copy of the November 1983—wrong one, your [309] Honor. I have no further questions, your Honor.

THE COURT: Any redirect examination of this witness?

MR. S. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Bill, I'm going to show you what I've just marked as Plaintiff's Exhibit 31 and ask you if that is a list of the 310 photographs that you previously provided to counsel for the defendant in your sworn interrogatories.

THE COURT: I think the question would be whether this is a list of the missing photographs.

MR. S. ABADY: That was my next question, your Honor.

A. Yes, it is.
Q. Is the list of the 310 missing photographs?
A. It's—yes.

MR. S. ABADY: I move it into evidence, your

MR. MONTBACH: Your Honor, I object to the characterization. It doesn't describe the 10 other ones.

THE COURT: It's a list of 300 out of the 310.

A. There's an explanation at the end for the additional 10.

THE COURT: It will be received in evidence. Not [310] to be handed in with any extraneous paper.

MR. S. ABADY: There is none, Judge.

(Plaintiff's Exhibit 31 for identification was received in evidence)

MR. S. ABADY: At the very bottom of the last page there is a description which corresponds to description of the Nikon cameras he used to take the pictures.

THE COURT: If there's no objection to it, I'll take it.

MR. MONTBACH: No objection. He's already testified to that.

Q. Bill, how many rolls of film did James Nachtway shoot to get the few pictures that were published in National Geographic?

MR. MONTBACH: Objection.

THE COURT: Sustained.

MR. S. ABADY: No further questions.

THE COURT: All right. Please step down.

(Witness excused)

THE COURT: We'll take a brief recess at this time, ladies and gentlemen. Everyone please return in about ten minutes.

(Recess)

(Jury present)

THE COURT: Call the next witness, please.

[311] MR. S. ABADY: The plaintiff calls William Kuebler to the witness stand.

WILLIAM KUEBLER, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Where do you reside Mr. Kuebler?
A. Chappaqua, New York.
Q. How old are you, sir?
A. I am 40.
Q. What is your educational background, please?
A. I have a BA in journalism from Pace University in White Plains.
Q. Would you please describe for the ladies and gentlemen of the jury your employment history?
A. I've been a photographer for 15 years, I originally started out at the Patent Trader newspaper in Mt. Kisco. I was there for five years, became a chief photographer, then I moved on to Gannett where I was a photographer for seven years and I'm presently the photo editor nights for Gannett.
Q. You've been working for Gannett since 1984?
A. Yes, I have.
Q. How many photographers do you oversee?
[312] A. We have a staff of 16 photographers.
Q. And what newspapers are the photos that you take or edit published in?

A. Mostly our photographs are in Gannett suburban newspapers, that's 13 newspapers in our chain. We're part of Gannett which has 33 newspapers including USA Today.

Q. How many photographers does Gannett employ?

A. I would guess over a thousand.

Q. And have you or any of your photographers, when I say yours those that work under you, won awards?

A. Yes, our staff is very proficient at winning awards. We won awards with the National Press Photographers Association, New York Press Photographers Association, Associated Press as well as Gannett corporate awards and our local Gannett suburban newspaper awards.

Q. Mr. Kuebler, have you won any awards for your photography?

A. Yes, I have. I've won awards local with Gannett, I one won corporate award and a National Press Photographers Association award.

Q. Where have your photographs been published?

A. My photographs have been in Sports Illustrated, USA Today, Next Magazine, Women's Day, a couple of books and I think that's about it.

Q. And in your capacity as the Gannett photo editor, [313] do you obtain slide transparencies from outside providers or agencies such as stock agencies?

A. Yes, we do.

Q. How are they handled?

A. Usually they're kept under lock and key.

Q. Why is that, sir?

A. Because they cost a lot of money to replace them. And my bosses are very specific about what we do with them.

Q. How much money do they cost to replace?

MR. MONTBACH: Objection, your Honor.

THE COURT: Overruled.

A. $1500 was the last one I worked with.

Q. Is that the industry standard for a lost or damaged slide?

MR. MONTBACH: Objection.

THE COURT: If he knows. I'll take it subject to cross examination.

A. It's the industry minimum.

Q. Industry minimum. How long have you been aware of that industry minimum?

A. Probably about 15 years when I first started.

Q. From what sources did you learn the industry minimum?

A. When I first started out there was a book called The Photographers Marketplace which was a basic bible for [314] photographers and also The Photographers Handbook which had the information in it and I assume from articles over the years.

Q. Are there books for persons such as yourself who is a consumer or user of stock photographic stock about obtaining stock photography?

A. Yes. There are several.

Q. Give me some examples?

A. The one that we use mostly in our office is the Photographers Buyers Guide which is a basic guide to purchasing stock photographs, depending on how you use them, one-time rights, how large you're going to use them.

Q. And there's the industry standard discussed in that work?

A. Yes, it is.

Q. Do you know Bill Gasperini, the plaintiff in this action?

A. Yes, I do.

Q. How do you know Bill?

A. Bill is a professional colleague of mine and a friend.

Q. How long have you known him?

A. About 25 years.

Q. How long have the two of you been doing photography together?

[315] A. I believe we started out in high school together, taking year book photographs.

Q. Are you familiar with Bill's work as a photographer?

A. Yes, I am.

Q. How many other photographer's works are you familiar with?

A. Hundreds personally that I've worked with over the years.

Q. I'm showing you collectively, Mr. Kuebler, what's been identified as Plaintiff's Exhibit 18. Have you seen any of these pictures before?

A. I've seen this one. It's hard to remember specifically. The Gulf War, yes. Bill has a large volume of work. I've seen this group.

Q. And of the photographs that you've seen taken by Bill Gasperini, how do those particular photographs, Exhibit 18, compare to the award-winning photographs of other photographers or others in the Gannett organization?

A. These are all wonderful photographs. Their composition is excellent, their lighting is very good, subject matter is gripping. They are every bit as good, if not better, than the photographs that we've taken.

Q. How does Bill Gasparini's work as a photojournalist compare generally to the photojournalists **[316]** whose work you edit on a daily basis?

A. Bill is an excellent photographer. His technical skills are great. His composition as I said before is wonderful. But more so I think it's his access to areas which is very important. He gets places where no one else goes, where our staff couldn't get.

Q. Such as?

A. His contacts have gotten him into Panama during the invasion, to the Gulf War onto the ships.

Q. Regarding the U.S. invasion of Panama, was there a press blackout?

A. Yes, I believe there was.

Q. Was it difficult for newspaper men such as yourself to get photographs from that invasion?

A. I've got to admit we did not try to send anyone to that because we're local, but I imagine it would have been quite—

MR. MONTBACH: Objection, your Honor.

THE COURT: Strike out what he imagines.

MR. S. ABADY: I have no further questions of Mr. Kuebler.

THE COURT: Counsel may cross-examine.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Kuebler, you said you've known **[317]** Mr. Gasperini—

THE COURT: Asked and answered. We had that. We heard it.

Q. Has any of your newspapers that you cover ever used any of Mr. Gasparini's pictures?

A. Yes, I believe we have.

Q. When?

A. Several years ago Bill was with a number of other journalists down in Nicaragua when they were captured by rebels and Bill came back and wrote a story for us and supplied photographs.

Q. I've seen the story, sir. Do you have the picture?

THE COURT: Just frame a question.

A. Do I have a picture?

Q. Yes.

A. No.

Q. Do you know when that was published?

A. That was before my time editing.

MR. MONTBACH: Counsel, was that produced with the pictures?

THE COURT: No discussion in front of the jury.

MR. MONTBACH: No further questions.

THE COURT: Any redirect?

MR. S. ABADY: Two questions, Judge.

[318] REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Mr. Kuebler, are you compensated for your testimony here today?

A. No.

Q. On what basis—

MR. MONTBACH: Objection, that's not—

THE COURT: Sustained. Not proper redirect.

Q. On what basis were you compelled to arrive here today?

MR. MONTBACH: Objection.

THE COURT: On what basis was he compelled what?

Q. Were you subpoenaed—

THE COURT: How can you subpoena an expert witness. Is he an expert witness?

MR. S. ABADY: He's offered as a fact witness as well as an expert witness, your Honor.

THE COURT: Strike it out. The jury doesn't care why he's here.

MR. S. ABADY: Fine. No further questions.

THE COURT: The court will note that counsel for the defendant was standing intending to object. Thank you, very much, you're excused.

(Witness excused)

MR. S. ABADY: Next, your Honor, the plaintiff [319] calls the expert witness, Ms. Jane Kinne.

MR. MONTBACH: I thought we had an expert witness.

MR. S. ABADY: He was listed as a fact witness. I don't know that we need to have this colloquy in the presence of the jury.

JANE KINNE, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. How old are you, Ms. Kinne?

A. I'm 69.

Q. Could you kindly tell the ladies and gentlemen of the jury your educational background?

A. I hold a bachelor's degree from the College of William and Mary in American history, a master's degree in audiovisual education from Columbia University.

Q. And when did you obtain your master's from Columbia?

A. In 1950.

Q. And did you pursue any postgraduate education?

A. I have taken a course in photography and the law through New York University, I have done some work in layout and design through Bridgeport University.

[320] Q. Could you describe for the ladies and gentlemen of the jury your professional career?

A. Well, it's 47 years in the photo industry starting with being the film librarian for Colonial Williamsburg which involved the maintenance of a file which was run as a stock file available on loan to various publications. I did that for two years.

I then went to New York to get my master's degree and while I was doing that, I was approached by the National Audubon Society to come and solve some problems they had with what they called their photo and film department. In effect, it was very much like the Audubon file, a collection of photography on natural history and the environment and then in 1950 they were trying to encourage use of pictures on envi-

ronmental issues and they asked if I would run that, which I did for seven years as a photo agency.

At that point I left Audubon and went to Photo Researchers Inc. which was a large agency in New York City almost entirely at that point in time in editorial photography. I was there for 30 years, the last twelve of which I served as president of the organization.

At that point I thought I was retiring but I was persuaded by Henry Scanlan of Comstock to come to Comstock and help build a stronger editorial department for that agency which was largely devoted to advertising and [321] commercial photography. I did that and did so for six years and when it was finally up and running, succeeded on April 1, 1993 in retiring.

I have since been a photo consultant for individual photographers handling some affairs for the various professional organizations, particularly in the legal area, and as the advisor and consultant to National Geographic's new photo agency.

Q. What is the Picture Agency Council of America?

A. It's a trade organization composed of at the present time 101 stock photo agencies throughout the United States and Canada.

Q. I'll show you what's been previously marked and admitted in evidence as Plaintiff's Exhibit 27.

MR. MONTBACH: That was not admitted in evidence.

MR. S. ABADY: If I misspoke, Judge, I apologize.

THE COURT: The clerk's minutes are the controlling record.

THE CLERK: I don't have it in, Judge.

Q. I show you what's been marked but not admitted as Plaintiff's Exhibit 27. Could you identify that for the ladies and gentlemen of the jury?

A. That is the most current directory of members of the Picture Agency Council of America.

Q. And what is your position with the PACA?

[322] A. At the present time, I am a honorary lifetime member and chairman of their legal committee.

Q. Have you held any previous positions?

A. Yes, I served two separate terms as president of this organization.

MR. S. ABADY: I would offer the document in evidence, your Honor.

MR. MONTBACH: Objection.

THE COURT: I'll sustain it on the ground of relevance. There's no showing that either the plaintiff or the defendant are members of it. I think the ruling is no proper foundation.

MR. S. ABADY: I'll lay a proper foundation later if I may, Judge.

Q. Did you ever serve on the executive committee of that organization?

A. Yes, I did. For a number of terms.

Q. What was your title?

A. I was chairman of the executive committee for a period of I believe six years.

Q. And what is the American Society of Picture Professionals?

A. It is a professional organization composed of various members of the photographic community. It is partly photographers, partly agents, partly librarians and art [323] directors from publishing houses and ad agencies.

Q. Have you ever served in that organization?

A. Yes, I have. I served one term as their national president and also served as the chairman of their legal committee.

Q. And have you ever been a speaker at seminars or panels given by that organization?

A. Yes. Almost on an annual basis.

Q. And Ms. Kinne, what is the American Society of Magazine Photographers?

A. It is a trade organization of photographers now known as the American Society of Media Photographers in recognition of the new uses of photography.

Q. And what has been your position with that organization?

A. I have been a sustaining member of that organization for it's almost 30 years now.

Q. Does that organization publish any kind of I business guide?

A. It publishes a business guide or Guide to Business Practices as it was called before. It's been through four editions that I'm aware of.

Q. And what are those editions?

A. Well, there was the original one in 1973 up through the last one which was in 1984.

[324] Q. What kind of information is contained in the ASMP guide?

A. It is all of the definitions and descriptions of the way photography is handled, not only by the photographers but by their agents and by the various people who borrow photography for the purposes of reproduction.

Q. When you say borrow photography, could you elaborate on that for the jury?

A. Well, by in large in the photographic world the photographer agent does not outright sell a transparency. What they are doing is using the framework of the copyright law that allows you to grant right to individuals or organizations to make a specific use of the photograph. And the user is limited to that specific use, the fee is structured to reflect the specific use, and after the usage the item returns to either the photographer or agent, and additional rights could be granted to many other parties or even that same right after a certain length of time could be granted again?

Q. What is a Photo Expo?

A. It's a big trade show that is encompassing the entire photo world including the manufacturers of photographic equipment.

Q. Have you ever been a panelist or speaker of Photo Expo?

[325] A. I have since its inception in 1983. It is an annual event in New York and a biannual event in the midwest and west coast.

Q. What is the International Photographic Congress?

A. It is a large meeting of a cross-section of people who participate in the photographic community. Photographers, users of photography, manufacturers, writers, lecturers in the field, and the Congress evolved at the Maine Photographic Workshop as the only international meeting in the United States involving all these people.

Q. You say Maine, you mean the state of Maine?

A. State of Maine in Rockport, Maine.

Q. Have you ever attended any of these?

A. I have.

Q. In what capacity?

A. I have a been a panelist in every year but one since its inception.

Q. Have you have ever been asked to appraise photography?

A. Yes, I've done appraisals for the estates of photographers for tax purposes. I've also done it for universities and museums and received great gifts of photography and I've done it for Sotheby's gallery in regard to their own photography.

Q. Have you ever been previously qualified as an [326] expert witness in the evaluation of original photographic transparencies?

A. Yes, I have.

Q. On how many occasions?

A. I've never actually counted this as an exercise in accuracy but it's somewhere in the vicinity of 70 cases.

Q. Ms. Kinne, have you had occasion to examine the work of Bill Gasperini?

A. Yes, I have.

Q. Would you tell the ladies and gentlemen of the jury—

MR. S. ABADY: In fact, excuse me one second. Could I have Exhibit 18.

Q. I show you a representative example of his work, Exhibit 18, collectively 18A through 18L. Have you seen these pictures before?

A. Yes, I've seen both the prints and the transparencies from which the prints were made.

Q. Are those representative samples of the ability of Bill Gasperini as a photojournalist?

MR. MONTBACH: Objection.

THE COURT: If she knows.

Q. In your expert opinion.

MR. S. ABADY: By the way, at this time I would offer Ms. Kinne as our expert witness.

[327] THE COURT: It's a question for the jury. The jury can consider her experience and her knowledge and determine whether they accept her professional opinion.

Q. Based on your professional opinion, Ms. Kinne, what is your opinion, do you have an opinion as to whether or not Plaintiff's Exhibit 18A through L is or is not emblematic of William Gasparini's ability as a photographer?

A. I feel that these are a good representation of the types of things that Mr. Gasperini does, based not only on the transparencies I viewed but the conversations I have had with him.

Q. Did you interview Mr. Gasperini?

A. I have done so on two occasions.

Q. And interview him specifically regarding the circumstances under which he took photographs?

A. That was one of the areas I was interested in. His habits in editing was another area that interested me.

Q. What is your opinion of the quality of Mr. Gasparini's work?

A. I think he is a first class professional photo journalist.

Q. Ms. Kinne, explain to the ladies and gentlemen of the jury how is a photograph made?

A. Well, there's a great deal that goes into it both before and after you actually raise the camera to your eye. [328] You have to have background information if you are doing this as a professional. You have to know your subject area. You have to understand the importance of the relative features of that area and you have to understand a great deal about how to go about getting access to that.

Then you go through the business of selecting your equipment the type of film that you will use for a particular job. Often times a photojournalist is very restricted because he must carry on his person everything he's going to use for the job as compared to a location photographer who may have a whole group of people helping him and a vehicle from which he can draw additional cameras, lenses or film.

A photojournalist has it all very often on his back. Then he has to survey what is available to him with the knowledge, the important thing here is the mind that's behind the eye that's going to be behind the camera. And he then selects the things that tell the story, give the relative importance to the story, tries very hard to round out that story, then he goes to the technical side of photography which is what about my light here, what can I do, what can't I do, how much action is involved in what I'm trying to record.

And then finally he goes to the aesthetics as much as the situation will allow to try and get the most [329] impact into his graphics.

Q. Does the knowledge of a region, that its history and culture, and the knowledge of the language of the region, bear on the ability of a photojournalist?

A. It's primary. Anyone can perhaps force their way into a situation but if they haven't done their homework or don't have all that background and the language skills in order to either let it be known what they are doing or to understand what is going on between the participants, what they record is sometimes meaningless and often times mediocre at best.

Q. Once an image is recorded on film and the film is processed and you have an original image, if it is lost it is replaceable?

A. If we are talking about color transparencies, if that original is lost everything is gone for all time.

Q. Can you explain why that is to the ladies and gentlemen of the jury?

A. Well, in the case of color film, the chemicals are on the film that goes through the camera and is exposed. That piece of film goes through a process that develops it on the same piece of film upon which it was exposed. There is no negative as there is in black and white. The positive color transparency is both the negative and the positive.

Q. Is a duplicate made of a color transparency or a [330] slide not the same as an original?

A. No, it is not the same as an original.

Q. Could you explain.

A. Duplicates being one generation removed suffer losses in focus sometimes, in saturation. They just do not have the same color quality that the original does. You can, depending on how much money you're willing to expend, come close. But it is indeed not the original.

Q. In the industry, and I mean both the advertising and editorial side of the industry, is it typical that duplicates will be accepted by lieu of originals?

A. Users like original photography. They have learned that the only thing they will get from catalog prints are duplicates but the rest of the industry still operates on originals.

Q. Is there, Ms. Kinne—strike that. What is involved in the process of editing a body or related group of work?

A. Editing is as much a skill as taking the picture. That was why I was terribly concerned about Bill Gasperini's edit experience and how he went about it. You have to take an entire group of things and spread them out in front of you. You can quickly get rid of the things that have obvious technical faults. You left the lens cap on. Somebody walked right in front of you at that final moment. [331] Somehow or other

somebody in the scene turned their back. Those things you have no control over.

Then comes the business of looking at the whole, going frame by frame with what we call an engraving glass or loop, where you look at each one with this magnifier that is color corrected and optically correct, just like the lens of the camera. And you look for the refined details of the technical part of it. You get rid of everything that does not come across as first class.

Then you go back and look for the story that you were trying to tell and you get rid of anything that really isn't contributing to that story line. And then finally you select within the story those things that have the greatest impact graphically or aesthetically.

Q. Light has an impact on the quality of a picture I take it.

A. There are many of us who think that light is the essential part of it.

Q. Are there other things, temperature, humidity, things like the weather that can affect the photograph?

A. If we're talking about at the time of the taking of the photograph, of course. If the weather is going to be bad all day as we have been having you have no choice, you have to go ahead. So you have to select your material in a way that the weather works for you, not against you. In [332] other words, you go for the moody look and so on.

The temperature, of course, affects how much activity is going to go on in a scene. We all know about the fact that none of us are as active when we're really feeling the temperature as other times.

Q. Ms. Kinne, could you tell the ladies and gentlemen of the jury is there an industry standard for a damaged or lost color slide transparency?

MR. MONTBACH: Objection, your Honor.

THE COURT: She can answer.

A. Yes, there is.

Q. Would you elaborate, please?

THE COURT: No, just tell us what the standard is. Don't elaborate.

A. It's $1500 per professionally-taken and professionally-edited transparency.

Q. Are Mr. Gasperini's works as you have seen professionally taken?

A. Yes, they are.

Q. Are they professionally edited?

A. Yes.

Q. In your opinion. Could you tell the ladies and gentlemen of the jury how the industry standard was developed?

A. This goes back as far as the late 1960S. At that [333] time, a number of users of photography, several publishers and two advertising agencies, approached the American Society of Magazine Photographers with a question about what is the value of the original transparency because they felt that color was becoming wide enough in use that they ought to seek some protection by way of insurance but they had no figure to go by.

ASMP called together a group of people representing agents, photographers and users and put the question to the group. The group decided that it wasn't broad enough to answer for everybody and started to do a survey. And so we started down the path, I was part of that group, to do a survey of users, photographers and agents.

Q. Forgive me for interrupting, when you say "group," are you referring to the Committee on Valuation?

A. Yes.

Q. Please continue.

A. And we devised a group of questions about the price ranges paid for various uses on a one-time basis, the prices paid when people used a picture repeatedly, something about what a photographer and an user thought if they were buying all rights to a photograph, what would they be willing to pay. We asked about the number of times photographs were reused and questions along the lines trying to come to some kind of

a value through the information of [334] the people in the community.

When all of this was tabulated, it was several years later because it was just precomputer, and we found that the average reuse figure and the figure for outright sale of all rights was a $1500 figure. That figure was then used starting in the early 70s and was actually printed in the 1973 Guide to Business Practices by ASMP.

Q. When you refer to users as part of the Committee on Valuation, would that include agents?

A. Agents actually were considered on the same side as the photographers. But the users were the advertising agencies, the promotion firms, the publishers of trade books, textbooks and encyclopedias.

Q. Did it also include producers of material for the education world?

A. Some of the people queried had what were called film strip or media divisions that did film strips, wall charts and so on.

Q. Is the defendant one such company?

A. Yes.

Q. What is the Society for Visual Education?

A. It is also a company that produces what we call corollary material such as film strips, wall charts, posters.

Q. Explain to the ladies and gentlemen of the jury [335] what you mean when you refer to film strips?

A. Film strips were sort of the forerunner of the CD ROM or the video. And they were a long strip on 35 millimeter film of individual still photographs that were projected in a special projector and could be shown to an entire classroom.

Q. And was the manufacturing of film strips the heart of or exclusively the defendant's business for many years?

MR. MONTBACH: Objection.

THE COURT: If she knows. I don't know how she knows.

Q. Let me withdraw that question and lay a foundation. Are you familiar with the defendant in this action, Guidance Associates, the Center for Humanities?

A. I certainly am.

Q. Would you explain to the ladies and gentlemen of the jury how you're familiar with the company?

A. Well, during my years at Photo Researchers, the mid to late 70s and into the 80s, the Center for Humanities was a repeat client. We saw their representatives on a regular basis and we certainly loaned transparencies and we billed for the rights to transparencies on many occasions.

Q. And what was the nature of the defendant's business?

[336] A. They were producing film strips for the educational market.

Q. And they would produce these film strips by use of stock photographs?

A. Largely by stock but they also would commission photographers to shoot specific things.

Q. And what is the Stock Photo Handbook?

A. The Stock Photo Handbook is another publication of the American Society of Media Photographers. It came much later in the game in the late 80s and around 1990, and it was again a book to give an overall view of the stock photo marketplace.

Q. And does the Stock Photo Handbook discuss the $1500 minimum industry standard?

A. Yes, it does.

Q. What is the Legal Handbook of the Picture Association Council of America?

MR MONTBACH: Objection, your Honor. I don't understand the relevance of all these handbooks.

THE COURT: I'll sustain the objection. Unless it's brought home to show an active participation by this defendant in the relevant time periods, such as signing an agreement or something of that sort.

Q. Ms. Kinne, are you aware of the defendant's place in the industry?

[337] A. Yes, I am.

Q. Do you know if the defendant was a member of industry organizations, photography industry organizations?

A. I can't say firsthand knowledge that I know that.

Q. What is a delivery memo?

A. A delivery memo is the document that a user receives when he borrows photographs for possible reproduction.

Q. Ms. Kinne, I show you what's been entered into evidence as Plaintiff's Exhibit 13A from Photo Researchers, your former company. Can you identify that document?

A. Yes. This is a sample copy of a delivery memo, but there is no customer information on the front side.

Q. It's just a blank form?

A. That's correct.

Q. I show you what's been admitted as Plaintiff's Exhibits 13F and 13G from FPG International. Would you tell the ladies and gentlemen of the jury what those are?

MR. MONTBACH: Objection.

THE COURT: Are they in evidence?

MR. S. ABADY: Yes, your Honor, they're in evidence.

THE COURT: If she knows what they are they can tell what they are. I believe that first document is not in evidence but I may be wrong.

[338] MR. S. ABADY: 13A is not in evidence? I would move it into evidence for the same reasons that you admitted F and G.

MR. MONTBACH: I think 13 is in evidence.

MR. S. ABADY: I have that marked also as in, your Honor.

THE COURT: Do you understand what these two exhibits are?

A. Yes, I do.

THE COURT: Answer the question.

A. The FPG form with the blue stripe is their delivery notice and the one with the reddish purple one happens to be a blank invoice form.

Q. How many members are there of the Picture Agency Council of America?

A. At the present time I believe it is 101 that are full members. There are some associates and pending members.

Q. Is it the practice of the industry, meaning all the members of the Picture Agency Council, when conveying original color transparencies to do so with a delivery memo?

MR. MONTBACH: Objection.

THE COURT: I think that's already been testified to by a prior witness. The jury should understand that there's no evidence at the present that either of the [339] parties to this litigation are members or bound by it. Also there's no delivery memo in this case.

MR. S. ABADY: We understand that, Judge.

THE COURT: As long as the jury understands that I'll allow the question.

A. To my personal knowledge, each and every member of the Picture Agency Council uses a delivery memo.

Q. And on the delivery memo—are you familiar with the delivery memo forms used by the membership?

A. I am. I've just recently completed a review of all of the paperwork of the various member organizations.

Q. And is the $1500 minimum industry standard printed on each and every agency's delivery memo form?

MR. MONTBACH: Objection.

THE COURT: I'll take the evidence subject to the cautionary instruction to the jurors that these particular parties in this particular case did not have such a delivery memo. But they may consider the existence of this arrangement for whatever

information it may supply to help them evaluate the missing slides.

A. The vast majority of the members in the Picture Agency Council use the $1500 figure. A few are now using a 2,000 or $2500 figure.

Q. That's the value of one color transparency?

A. One original color transparency.

[340] Q. Why is it that some members have increased the minimum value of one transparency?

MR. MONTBACH: Objection.

THE COURT: Common sense. I'll let her answer. You know it ought to be obvious, it shouldn't even be necessary to ask.

A. It is the obvious inflationary factors that have occurred since the late 1960s.

Q. I want to show you what's been previously marked and I'll do these all at once, your Honor, as 13B, 13C, 13D, 13E, 13H. Do you recognize these?

A. Yes. These are delivery memos from Magnum Contact Press Images, Sports Illustrated, Impact Visuals and a Magnum invoice as well.

Q. And are those all stock agencies in New York City?

A. Yes, they.

Q. And those forms all contain the minimum industry standard?

A. They all contain a standard. I believe one of them is the higher figure. Maybe I'm wrong. No, it's all at 1500.

MR. S. ABADY: I offer these in evidence, your Honor.

MR. MONTBACH: Objection.

[341] THE COURT: Are any of them to this defendant?

MR. S. ABADY: None to this defendant. All as part of the industry.

THE COURT: I'll take them with the understanding that they don't involve this defendant or this plaintiff. We don't need to show what other people in the industry are doing.

MR. MONTBACH: They're not relevant.

THE COURT: They're subject to cross-examination as to whether they really pay the money.

MR. MONTBACH: They're not relevant to this case.

THE COURT: Just the practice of either people in the industry.

(Plaintiff's Exhibits 13C for identification were received in evidence)

Q. In this case, Bill Gasperini did not deliver a memo to the defendant when he delivered 300 and later 10 slides to the defendant, does that make sense to you?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Do you have an explanation as to why that might be the case?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Is it the practice of a producer or editor of a [342] video series to use the delivery memo or are delivery memos used only by someone who is providing only original stock photography but is not staying with the photographer?

MR. MONTBACH: Objection.

THE COURT: If she knows.

A. Normally if the photography belongs to the producer or director, there is not necessarily a memo.

Q. Why would that be?

A. Well, it would sort of be like writing a letter to yourself.

Q. Is that because the producer and the photographer stayed in possession of the material?

MR. MONTBACH: Objection.

THE COURT: She's answered it. It would be like writing a letter to yourself. That's her answer.

Q. Mrs. Kinne, how are the photographs of photojournalists and other photographers valuated in your experience in.

MR. MONTBACH: Objection.

THE COURT: If she knows.

A. The professional photojournalist, once he has been edited, is valued as the industry at $1500.

Q. What are the criteria used to determine the value of an original color transparency?

A. Well, first of all it is the technical excellence [343] of the photograph. The second can be called the aesthetic value or the particular eye of the photographer. The third is usually the subject matter, the value of the subject matter, the way the subject matter has been treated. It's also the value of a particular photograph in relation to a whole particularly with a photojournalist where he's trying to tell an entire story.

Q. How would the market value of the 310 lost slides be determined?

MR. MONTBACH: Objection.

THE COURT: Overruled. Have you been asked to give an opinion as to the value of the 310 slides in this case?

THE WITNESS: Yes, I have, your Honor.

THE COURT: How did you go about forming such an opinion?

THE WITNESS: I viewed what material Mr. Gasperini was able to bring me of a similar type from other parts of the world, a few from Central America. I interviewed him extensively about his habits as an editor and then I asked him to

select with me the photographs that are here and I witnessed for myself his ability to edit a cross-section of his material.

Q. Did you have occasion to view the video series which has been in evidence as Plaintiff's Exhibit 10 [344] entitled Conflict in Central America?

A. Yes, I have seen all the videos.

Q. And did you look at the still shots which were Mr. Gasperini's slide transparencies?

A. I looked at them but basically for their content. It's very hard from a video to make an accurate judgment of what the original might have been.

Q. And based on all of the work that you've just described, can you ascribe a value to the lost 310 slides?

A. Yes. And I valued them at $1500 each.

Q. And how is it that you reached that conclusion?

A. Because I had become convinced that he was a professional photographer taking professional quality slides that had been professionally edited.

Q. Now, $1500 for a picture sounds like a lot. Can you explain to the ladies and gentlemen of the jury how you reached that conclusion?

A. Well, first of all if these transparencies were available, they could, in the stock photo marketplace, be used for a great variety of purposes over a very long period of time.

Q. Could you explain that please?

A. Well, Mr. Gasperini holds the copyright in each of his photographs. And that copyright is good not only for his lifetime, but for 50 years beyond. So that it becomes a [345] part of his estate. During that long period of time, the pictures, many of them would be used a great many times for a great variety of fees. And the fees can range anywhere from 50 to $75 for some of the disks that are being done today, to as many as $10,000 for rather common, ordinary advertising shots. You do that over and over for the life of the copyright, and the $1500 becomes a very fair and reasonable figure.

Q. Now, is market value the primary means of establishing the value of an original color image?

MR. MONTBACH: Objection.

THE COURT: It calls for a question of law, doesn't it.

Q. What is the primary means of establishing the value of an image?

MR. MONTBACH: Objection.

THE COURT: I think that's the same question coming through the back door. The court has already told the attorneys its view on what the market value is.

Q. Do you determine the potential value of lost property, that is in this case lost photographs, based on the past market history alone?

A. No.

Q. And why not?

A. For one thing we never know from day to day what [346] will be asked for. We have some long time knowledge from our experience in the industry but a single news event can change that very easily.

Q. Could you give an example?

A. Well, the recent D-Day. There were pictures of D-Day that had never been published. All of a sudden as we approached the 50th anniversary, every publication, every TV station, even your local newspaper was out looking for material from D-Day 50 years ago and particularly for things that the public hadn't seen before.

Q. Where would they obtain this material?

A. Well, from many individual photographers, from stock agencies and from a lot of historical sources such as state libraries and so on.

Q. Are there libraries that are never used as stock that attain value?

A. Photographers and others often times maintain a photo collection for many, many years and don't particularly think about its value or the value of a particular image until a customer comes along who is searching for one particular image with certain qualifications.

Q. Do some color photographs become more valuable beyond the lifetime of the photographer?

A. In my experience that has happened a number of times, that the photographic estate increases in value for a [347] number of years after the death of the photographer.

Q. Are there photographic libraries of magazines for example that were not used to stock photography that still have value today?

A. There are many that those of us who have a historic feeling would like to open up for the public.

Q. But specifically to bring it home, magazines that the jury would be familiar with, Time, Newsweek, Life, common magazines, do some of these have photography which has value even though it has never been placed in stock?

A. They have libraries of material, almost all of them now do have a stock operation but it does not necessarily include all of the material. National Geographic has just, within the last year, decided to open their files for use by others.

Q. Would Mr. Gasperini's best photos of the civil wars in Central America have value in the future?

MR. MONTBACH: Objection.

THE COURT: If she has an opinion.

MR. MONTBACH: Pure speculation.

A. I believe they will have value in the future as the history of Central America grows, looking back to see why certain things happen, how they happened. That's certainly been the case with other areas of the world.

Q. Besides the things that you've mentioned already, [348] computers, newspapers and magazines, are there other types of media in which stock photography is used?

A. Well, it's used in advertising. And by advertising I don't necessarily mean the big billboard or the double page spread in the magazine, but all the travel brochures you see, wherever there are brochure racks in airports, hotels and so on, they're all the things that come with your monthly credit card

that contain photographs promoting or advertising one thing or another. There are endless textbooks, trade books and now this whole realm of disks of one kind or another.

Q. How important is prior sales history in determining the industry standard?

A. It can have bearing but it is not a good indicator in all cases.

Q. Why not?

A. Frequently—I can give you one very good example. The picture that appeared on the sides of U.S. mail trucks and on the Express Mail package for a long period of time of the bald eagle with its head turned way to the left and a full moon behind it, that is two pictures. That bald eagle sat in a file that I managed for eleven years. I went in and out, was never chosen until the day that the Postal Service arrived with a predetermined layout that said they had to have an eagle with its head turned all [349] the way to the left.

Q. And how much money has that singular photograph generated?

A. I haven't been in on the very last of this but it was well over $20,000 when I last checked it, which was in 1986.

Q. That would be just for a one-time use?

A. It was for use in connection with Express Mail.

THE COURT: That was not a photograph, that was artwork was it not?

THE WITNESS: It was a composite photograph composed of the eagle, the moon was a separate photograph. It was taken into the studio or darkroom and the two put together to do what we call a sandwich.

Q. Ms. Kinne, I show you what's been admitted in evidence as Plaintiff's Exhibit 12A, these three documents, and I ask if you recognize them?

A. Yes, I recognize them.

Q. I show you what has been previously marked as Plaintiff's Exhibit 23, let the record reflect I've provided counsel a copy, and I ask you if you recognize that?

A. Yes, I recognize it.

Q. Would you explain these documents, that is 12A and 23, to the ladies and gentlemen of the jury?

A. The first one is an invoice to the Center for [350] Humanities from Photo Researchers. It is for the loss of what is seven original color transparencies.

The second document is a portion of Photo Researchers sales book recording each invoice and the pictures and photographers involved in each invoice.

The third is a letter from the Center for Humanities addressed to me. It was dated February 2, 1977 and it indicates that there is a question about some pictures which the Center would like to have verified as to whether we know if they've been returned or not.

The final piece of paper is a page from my memo pad in my handwriting dated October 13, 1977. And again listing the same photographs and recording a discussion I had concerning a negotiated settlement for the loss of those seven transparencies.

Q. Was the minimum industry standard on the documents $1500 for the seven images?

A. In 1977 it would have been, yes.

Q. Did the defendant pay the full amount or some other amount?

A. No, the defendant did not pay the full amount. There was a negotiation that went on which my memo indicates what that was about. And they, in the end, paid S4500 for the seven.

Q. Could you explain what it was about?

[351] MR. MONTBACH: Objection.

Q. Referencing number 23.

THE COURT: The question is an ambiguous question. As I understand it what makes this effective is putting in the memorandum receipt, isn't that right? That's why it's printed on the back.

THE WITNESS: Right.

Q. Was there a reason, Mr. Ms. Kinne, in this transaction why the defendant did not pay the full amount?

A. Yes, there was.

Q. Could you please explain to the ladies and gentlemen of the jury?

A. Well, first of all they came forward when they realized that they couldn't account for the seven pictures and when it was verified that we did not have them, they entered into a series of discussions about how they could settle the matter and it was done quickly. It took into account the particular pictures, some of which were of buildings and very common objects. It also took into account the desire of the particular photographers who were all aware that the Center for Humanities was a very good client, that we tried to reach an amiable settlement.

Q. Now, is the minimum industry standard of $1500 largely observed by the industry or honored only in the breach?

[352] MR. MONTBACH: Objection.

THE COURT: If she understands the question I'm going to let her answer that because I'd kind of like to know that myself. It was obvious it was enforced in this case.

THE WITNESS: The industry is a reasonable industry and where we can, and there's evidence that negotiation of some other figure is warranted, fine. But in the vast majority of cases they pay the $1500.

Q. By "they" you refer to users such as the defendant?

MR. MONTBACH: Objection.

Q. Is that correct?

A. Yes.

MR. S. ABADY: One moment, Judge.

(Pause)

MR. S. ABADY: Thank you, Ms. Kinne. I have no further questions at this time.

THE COURT: Counsel may cross-examine.

MR. S. ABADY: If I haven't done so I would move Plaintiff's Exhibit 23 in evidence.

MR. MONTBACH: Objection.

THE COURT: I'll rule on it later. Hand it to the clerk. You're objecting to 23?

MR. MONTBACH: To the first word on the memo, **[353]** your Honor?

THE COURT: Objection sustained. You didn't look at the whole sentence. Please proceed.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Ms. Kinne, what is a catalog chrome, a term you used?

A. Most of the stock photo agencies in the mid 80s and onward produced catalogs, representative pictures of their files. Those catalogs were printed in large quantity and distributed to 20 to 50,000 people who purchased photographs. They were printed with the idea that they would generate requests, simultaneous requests for given photographs from many places and therefore the catalog chrome, and I use that meaning each and every picture appearing in a catalog, had to be duplicated in order to fulfill simultaneous requests.

Q. You say that a duplicate can come close to the same quality as an original, is that correct?

A. It can if you don't mind how much money you spend.

Q. How do you do that?

A. You do it in a lab by exposing the original on to duplicating film and then processing that. That can be done in a traditional sense or for the very, very fine image you **[354]** are projecting an aerial image and capturing that.

Q. Isn't it true that now any picture can be digitized and anything can be done with any picture?

A. Anything can be done. The quality is still somewhat I have iffy.

Q. It can be improved, can't it?

A. It depends on what you mean by improved. It can be changed.

Q. A picture can be made lighter?

MR. S. ABADY: Objection. There's no proof that the duplicates here were digitized.

THE COURT: Overruled.

Q. So an original can be digitized and improved to the first quality?

A. I have looked at a lot of digitized images that were given to me to replace largely damages. I have accepted only one.

Q. Mountains can be moved in pictures and everything?

A. Pyramids I think it was.

Q. Woody Allen can be put into movies?

A. Yes.

MR. S. ABADY: Or prison.

Q. You talked about the problem—

THE COURT: Whatever she talked about they heard.

[355] Q. With regard to duplicates having lost some focus, focus can be changed, put back in by digitizing?

A. You can attempt it. It's not very successful.

Q. What is saturation? I don't understand that term?

A. That is the ability to reproduce the color with its full vibrancy as in the original object.

Q. That can be done with a duplicate through digitation?

A. You can change color and deepen it in digitizing. In fact, it's harder to get it exactly as it was. It's easier to either lighten or darken it.

Q. You can put it into any color you want to?

A. You can totally change it.

Q. Now, you spoke of—

THE COURT: No, no.

Q. The uses as far as advertising. With regard to advertising, when you saw Mr. Gasperini's pictures, do you feel that those pictures, I'm talking about the war pictures in Central America, could be used in any advertising?

A. I have seen war pictures used in advertising. Not necessarily the Contra revolution but certainly the Gulf War.

Q. Have you done any research into whether or not Contra revolution, Central America pictures from the mid to [356] late 80s have been used in advertising?

A. No, I did not.

Q. In fact, Mr. Gasperini's pictures would be used for editorial purposes in the main, would they not?

A. They could be used for promotion and advertising and a very large editorial market, yes.

Q. Promotion of what?

A. You'd be surprised. We see pictures of Viet Nam conflict advertising travel to Viet Nam in peace time.

Q. Showing pictures of the war?

A. Some of the war pictures were used because they made such an impression on people and now the view is purportedly very different.

Q. Many of the pictures that are on the list admitted in evidence are of actual war areas.

A. A portion of them, yes.

Q. Are you telling us that those would be used and engender a lot of income from advertising or are you saying that those would be mainly used for editorial?

A. I said they could be used in this type of advertising.

Q. Did you see any of the ten pictures that Mr. Gasperini did not edit?

A. No. Of course not. They were gone.

Q. And you're assuming that these are also worth [357] $1500 each?

A. By what I have been told about their selection as representative, yes.

Q. What were you told about the selection?

A. I was told that Mrs. Gasperini went to the files of pictures and selected representative views.

Q. Did you talk to her about her ability to edit pictures?

A. I have talked to her but not in depth.

Q. About her ability to edit pictures?

A. No, I haven't.

Q. You talked to her but not about editing pictures?

A. No. But she's certainly well-informed on the subject area.

Q. And you weren't given any description of what those ten pictures were?

A. No, I was not.

Q. Yet you still think they're each worth $1500?

A. I say that based on his ability as a professional photographer, yes.

Q. What about the 4700 other pictures that are sitting in the courtroom that Mr. Gasperini took of that area. Are each of those worth $1500?

A. Not all of them, sir. I think they would have to be subjected to an additional edit.

[358] Q. Some of them are merchantable?

A. They may be. I haven't looked at them item by item for that purpose.

Q. In fact, when someone edits, don't they edit for a particular purpose?

A. That can be one criteria. If you're an agent as I have been all my life you have to edit for a whole host of purposes.

Q. You spoke of a story line. You're editing for a certain story that you want to convey to your public, is that correct?

A. That can be the case or it can be an overall story. It can be an overall recording of what is there at any given time.

Q. So then it's true then that pictures that may have been rejected for a certain editing process would be perfectly good for another editing process, is that correct?

A. That's why I suggested that we have to go back through the others and see. There may be some, although I found out by watching that Bill Gasperini is a very good editor.

Q. For a particular purpose, right?

A. He had a purpose in mind, yes.

Q. And when a photographer such as Mr. Gasperini takes pictures of a subject, he takes multiple pictures, is [359] that correct?

A. Well, he doesn't just shoot one picture. But if you believe the basic definition of photography, he takes a series of pictures. No two of them are exactly alike.

Q. And he was taking these pictures when he was performing his job as a journalist and a radio journalist, is that correct?

A. That is correct.

Q. So his primary function while he was taking these pictures was to gather information for writing or speaking, rather than photography, isn't that correct?

A. All photographers are gathering information at all times. Whether they are communicating that information by spoken word, written word or image depends on a given situation.

Q. A photojournalist who is hired to go down and take pictures is down to take pictures, that's his primary job, is that correct?

A. If he is fortunate enough to work for an organization who is able to have individual specialists, not people who do many tasks.

Q. Am I correct that if you were to go with a different story to the 4700 slides, you could possibly edit those out and have a different story and they would be perfectly merchantable?

[360] A. It's possible, although I suspect you would miss the 300 that had already been taken.

Q. We all know that those 300 are not there.

MR. S. ABADY: 310, judge.

Q. Those slides are not there.

THE COURT: I think at this stage of the trial the jury knows that. Maybe if you keep repeating it, you'll be sure they know it.

Q. Those 310 are not there.

THE COURT: We know that.

Q. Is there anything that you know that would preclude Mr. Gasperini or any other photo editor from going to his 4700 other slides and taking out other slides that could be merchandised and sold for editorial purposes?

A. There's nothing to prevent them from looking to see if they're there.

Q. Is there a demand today for Central American slides?

A. Yes, there is.

Q. Has there been a demand over the last ten years for Central American slides?

A. Yes. In regard to certain issues such as the conflicts.

Q. Has that demand had any fluctuation over the last ten years?

[361] A. It fluctuates with events.

Q. And do you have any knowledge as to when the peak in that demand was?

A. I couldn't say that I was right on top of that, no.

Q. Did you do any research into that in preparation for coming here today?

A. No, I did not.

Q. Do you know how many magazine articles have been published about Central America, war in Central America over the last nine years?

A. No, I did not.

Q. You didn't research that?

A. No, I did not.

Q. You don't understand that it has fallen off dramatically over the last five years?

A. I know that interest in Central America has fallen off a number of times over the years I've been in the photo business to reappear again.

Q. Is there any, to your knowledge, any ground swell of need of photographs of Central America such as the D-Day situation that we have now or had recently at the present time?

A. Not at the present moment.

Q. Has there been any such ground swell on [362] anniversaries of events in Central America?

A. I think every year on the birth dates of some of the heroes of South America we get asked about those people.

Q. And you have slides to fill those requests, is that correct?

A. We have various types of illustrations, yes.

Q. None of them are Bill Gasperini's?

A. I never had the good fortune to represent Mr. Gasperini.

Q. How would someone who needed those slides today get Bill Gasperini's pictures for Central America without getting the 310 slides?

A. Well, if he has some material with an agent and if they address that agent they may get some material. They may know how to reach him. I don't know. Photo Researchers keep amazing files.

Q. Are there any publications that people could look at?

A. There are some but in the editorial area, they are not vast.

Q. As a matter of fact, people go to the stock agencies for the subject, not the photographer, isn't that correct?

A. Stock is largely anonymous for most users.

Q. So if someone's photographs are not in the stock [363] agencies they're not going to get out to the public or earn any money?

A. Through a stock agency. But there are researchers who go to individual photographers.

Q. If you were to obtain pictures for Central America in the 80s in the wartime, where would you look?

A. I would be very apt to go to several of the agencies to specialists in in-depth reporting. Such as Impact Visuals. I might go to Sigma, or to Gannon or Liaison as it's now known.

Q. Magnum?

A. I might go to Magnum.

Q. If you went to Impact Visuals you wouldn't get any slides from Mr. Gasperini, would you?

A. He has some material there. I have not questioned what it is, exactly.

Q. I'm talking only about slides of Central America. When you were at Photo Researchers and you delivered images to your customers, how did you deliver them to them?

A. In the days that I was there a lot of it was done by messenger or courier. Some of it was done by United Parcel. And in the latter days some of it was done by Federal Express.

Q. And your testimony was that you always had this memo that went with it?

[364] A. Each package contained a delivery memo.

Q. And what would be on that delivery memo as far as listing of what was being transferred?

A. It would contain the identifying number of each transparency. Photo Researchers had its own system.

Q. Would you have delivered slide transparencies to any of your customers without any enumeration of the number or identifying marks or descriptions?

A. We had to when it was a whole assignment coming through. But otherwise we would deliver them as numbered photos.

Q. What do you mean as a whole assignment coming through?

A. We had photographers, who we arranged to have cover specific events in various places in the world. The film came in. Our sole responsibility was to have it processed and transmitted to whoever assigned it.

Q. You acted as a conduit?

A. As part of our agency representation.

Q. I'm talking about—

THE COURT: She's answered you. Go on to something else.

Q. Where do photographers who want to sell from stock advertise themselves?

A. Sell from stock?

[365] Q. Sell stock photos.

A. Not all of them do but some of them have ads in the various, what we call the books, the creative books. But those are largely aimed at advertisers.

Q. How many stock agencies are there worldwide?

A. That's a good question. We've tried through PACA to find out over the years and it's probably somewhere between 4 and 500.

Q. Is there an average number of slides each one keeps in their inventory?

A. Not at all. They vary from very small to very large operations.

Q. Some have thousands, millions?

A. Comstock had 4 millions.

Q. So there are millions and millions of stock images sitting in stock agencies throughout the world?

A. Yes.

Q. What are the odds that any particular image would be chosen to be used?

MR. S. ABADY: Objection to odds.

THE COURT: Can you answer that?

A. I have no accurate firsthand knowledge of how often or what the chances or probability is.

Q. The odds are pretty slim.

THE COURT: Pretty slim. We know that. Let's go **[366]** on.

MR. MONTBACH: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. S. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Ms. Kinne, are you familiar with or have you seen any of the trade publications of the military industry in this country?

A. On occasion a few of them.

Q. And those publications for advertising purposes and not for editorial purposes use stock photography of war scenes, is that correct?

A. Absolutely.

Q. Now, if some of Mr. Gasperini's outtakes, that is the pictures he rejected, are worth $1500, does that mean that his select pictures which the defendant lost are worth less or more?

A. They certainly are not worth less.

MR. S. ABADY: That's all I have.

THE COURT: Anything else?

MR. MONTBACH: No further questions.

THE COURT: Thank you, very much, Ms. Kinne. You're excused.

[367] (Witness excused)

THE COURT: We'll see you at 9:30 tomorrow morning. You're excused for the balance of today.

(Jury not present)

[367] THE COURT: As I understood it, the last witness has appraised collections of photographs for estates and for gifts. Neither of you asked her what a reasonably well-informed buyer, what a reasonably well-informed seller under no compulsion to buy or sell would have paid for the collection of 310 transparencies and it's really not my function to try the case for you. She was a knowledgeable witness and it's incredible to me that every single one of 310 photographs is

worth $1500. Some of them are probably worth more than $1500 and some are probably worth very little.

And I just think you've left this jury with no guidance when you could have provided it. I really think maybe both of you should rethink your position on this case and see if you can find a way to resolve it before it goes to the jury.

MR. S. ABADY: I take what you say as insightful.

THE COURT: She could have answered that.

MR. S. ABADY: I don't think anything that you say will cure the coverage issue and that's the reason this case has to be tried. You have to speak to those gentlemen **[368]** and that table.

THE COURT: Nobody with any brains can believe that every single one of those is worth $1500. Some are worth more and some are worth less.

MR. S. ABADY: He's 39 years old. Who knows 50 years after his death what they'll be worth.

THE COURT: You can't speculate. You're making a grave mistake of tactic. That's your business.

MR. YOUNG: Since I'm here on behalf of the Center for Humanities and since Mr. Abady said that the coverage issue is the problem, I feel compelled to bring to the court's attention that Mr. Abady three days prior to the time that I came here to start the trial upped his demand by $250,000.

THE COURT: There's really not very much I can do about that. Somebody has a very wrong view of this case. I really don't think that it is I.

MR. YOUNG: There's no way for us on behalf of the Center to resolve it.

THE COURT: I'm going to be here and preside over a verdict and you can cross-appeal to the Court of Appeals. Here you had a basic question that this witness could have

answered and neither of you asked it. So it's your red wagon. What's left here to do?

MR. S. ABADY: We're ready to rest.

[369] MR. MONTBACH: You have no further witnesses? He subpoenaed some of our people.

THE COURT: He's just told you in plain English, as plain as he has used during the trial, that he has no more witnesses and he's going to rest.

MR. MONTBACH: I've asked him about the subpoenaed witnesses who he has before said may be needed on rebuttal.

MR. S. ABADY: I'm not releasing them if they're needed on rebuttal. And you wanted to fly a witness out of the country.

THE COURT: How many witnesses do you have?

MR. MONTBACH: Two and possibly three.

THE COURT: Have them all here in the morning.

MR. MONTBACH: I will.

THE COURT: What the court proposes to do, I'm required to go to Foley Square to be there at one. I plan to leave the jurors with the projectors so they can watch these three volumes and I'm going to order them not to discuss them but just to look at them, probably in the jury room, and to look at this other lengthy exhibit or exhibits but not to discuss them, and then to go to lunch and I'll resume with all of you as rapidly as I get back from Foley Square, which very likely will be—we now have a message from a juror that says she has to register for school in New **[370]** York at eleven o'clock tomorrow.

We're on the edge of the Fourth of July weekend. This should have been a one-day case. Both of you have magnified it unduly and I don't think they want to come back after the Fourth.

The court has motions and sentences and criminal matters on Friday. I think you'll just have to tell the juror to be here unless you want to go with five.

MR. S. ABADY: The other option, your Honor, we could meet you at Foley Square if she has to register in New York we could all meet in New York.

THE COURT: We need a courtroom, we need a deputy clerk, we need the court reporter. That is the most fantastic—you're living in a dream world.

MR. S. ABADY: I knew you were the chief judge, your Honor.

THE COURT: I'm no longer the chief judge. I don't have a courtroom in Manhattan and there are more judges than courtrooms.

MR. J. ABADY: Which juror is it?

THE COURT: Number 6.

MR. S. ABADY: Also, in light of your discussion I think what we might do then in the morning for five minutes would be to complete with Ms. Kinne as to the line of questioning that you—

[371] THE COURT: She's excused. I'm not going to bail you out. You won't listen to me and you keep making remarks when I make rulings and you're arguing issues in front of the jury. I think you have an unrealistic view of this case.

MR. S. ABADY: Your Honor, all I can say is that the level of research as to how these cases have been tried in the past.

THE COURT: You won't listen. It doesn't do any good to talk to someone who won't listen. What is your pleasure about this juror?

MR. MONTBACH: I cannot waive six, your Honor.

THE COURT: What about you?

MR. S. ABADY: I'd be prepared to make sure that we finish before the end of tomorrow.

THE COURT: I think you'll have to tell her. You're going to have a discontented juror listening to your drivel. Tell her she'll have to be here and she'll have to make whatever other arrangements she can. The greatest thing to have in the jury room is a discontented juror who doesn't want to serve.

(Pause)

(Juror six present)

THE COURT: I understand you have a problem but we have a problem too. We're down to six jurors and we're [372] coming close to the Fourth of July and everybody has invested a lot of time and effort in this case and I'd really like you to stick it out and complete your jury duty.

JUROR SIX: I need to go to graduate school.

THE COURT: Is that the only day you can register?

JUROR SIX: I missed the other day because I was here.

THE COURT: Have you called them up and told them you're on jury duty?

JUROR SIX: I was hoping we'd be done.

THE COURT: What school is this?

JUROR SIX: Bank Street College.

THE COURT: You call them up, tell them you're on federal jury duty and if they forfeit any rights on that ground, the court will report it to the United States Attorney. I'm awfully sorry. I know that this case should have been concluded by now but it's unavoidable and it's part of your civic duty. I can't excuse you. You'll have to be here.

Good evening.

(Trial adjourned to Thursday, June 30, 1994; 9:30 a.m.)

[373]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204 CLB

WILLIAM GASPERINI,

Plaintiff,

v.

THE CENTER FOR HUMANITIES, INC
d/b/a GUIDANCE ASSOCIATES,

Defendant.

June 30, 1994 9:50 a.m.

Before:

HON. CHARLES L. BRIEANT,
District Judge.

APPEARANCES

RUBIN, KALNICK & BAILIN
Attorney for Plaintiff
SAMUEL A. ABADY
JONATHAN S. ABADY

BIGHAM ENGLAR JONES & HOUSTON
Attorney for Defendant
FRANCIS A. MONTBACH

MARTINDALE & BRZYTWA
Attorney for Defendant
KEVIN H. YOUNG

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[374] (Jury present)

THE COURT: Good morning, members of the jury.
Mr. Abady, you can go forward at this time.

MR. S. ABADY: On behalf of the plaintiff, William Gasperini, this case is concluded, we rest.

THE COURT: The plaintiff rests.
Mr. Montbach, you may now go forward on behalf of the defendant.

MR. MONTBACH: Thank you. The defendant calls as his witness Mr. Gideon De Margitay.

GIDEON DE MARGITAY, called as a witness by the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MONTBACH:

Q. By whom are you employed?
A. I'm self-employed.
Q. What is your business?
A. I'm a consultant for editorial projects.
Q. What does that involve?
A. Involved with visual projects, photography.
Q. For whom do you provide your consulting services?
A. I had—my principal client for the past 10 years also was Time Incorporated.

Q. What have you been for Time Incorporated?

[375] A. I was involved in a magazine launch project and I was involved in various book projects, picture book projects which were quite extensive. They usually were two years worth each and resulted in big photographic books. Not photographic books, books richly illustrated.

Q. What was your involvement in producing these books?

A. These books were for use by a whole team of people like a magazine is produced. And my title was editorial coordinator which there was an editor, there was an art director, we had writers, picture researchers, and I think I could sum it up by saying that the editor wrote the music, the art director provided the orchestration and I directed the orchestra.

I bought the pictures, negotiated for them, was responsible for the budget also and every single photograph and every piece of copy cleared through my desk and I was responsible for putting it together in a book.

Q. And what were the titles of these books?

A. One of them was Life's *History* of *World War II*. I have it here if you want to see it. I brought along another big one, which was on the Kennedys, which was, the title is *Life in Camelot, the Kennedy Heirs,* and there were several smaller books.

Q. Would you just show me what books you're talking **[376]** about?

A. Certainly.

Q. What are you listed as in your job?

A. I am listed as editorial coordinator.

Q. Thank you. You can put the books down.

Would you give us a thumbnail sketch of your background, sir?

A. I will try to make this very brief. I'm sorry, I don't mean to bore anybody with it.

My involvement with the picture business started in 1947. That year is was in news pictures in the Paris bureau of the New York Times. Three years later I left and I joined a New Jersey agency, which was one—which was the successor

agency for the Marshall Plan, and I was deputy chief of the photo branch of the information setup. I was responsible for assigning about ten photographers throughout your Honor to cover various Marshall Plan activities. That was then.

And then I rejoined the New York Times in 1954, this time in New York and stayed there until 1961. During that time I was instrumental in introducing 35 millimeter photography into the newspaper. This today seems to be normal but in those days everybody was big bulky speed graphic cameras and this brought really new photographic techniques into the newspaper business.

[377] I left them in 1961 and rejoined Magnum Photos Inc., international picture agency which is considered the Tiffany of the business, it's an international photograph journalistic cooperative which in those days had as its prime photograph members people like Henri Bresson, Cornell Capa, Burt Glinn, and internationally recognized very big names. In Paris also. And our clients were leading picture magazines, not only in the United States but also in Italy and France and so on and so forth.

And my job was to represent these photographers and get them the best assignments and the best deals possible. We also maintained an extensive picture library so we acted at the same time and Magnum still acts both for first rights and assignments and as a stock house.

I left at the end of 1963 and joined the editorial department of Life Magazine. And work and stayed with Time Inc. then for the next ten years or so.

My assignment was to go overseas and they sent me back to Paris for this and set up an international syndication outfit. Syndication really means selling pictures or selling copyrights. And with a network of agents I set up we sold Life Magazine pictures and at times text throughout the world.

I returned to the United States again in 1972 and in my assignment was to then make that effort, which **[378]** incidentally encompassed not only Life but all the Time Inc. mag-

azines at the time, nationwide, and introduce the whole system also in the United States.

I then left the company a couple of years later and had nonprint jobs, television and so on, and became self-employed and became an editorial consultant. As an editorial consultant, as I mentioned, one of my main clients was Time Inc.

Indeed until last year I had an office in the Time Life Building. I did these various books for them. I know that's overstating it. I was one of those who worked on these various books for them and I bought probably between $80,000 and $100,000 worth of pictures or picture rights for each of them. I was on both sides of the fence. I represented photographers on one hand, in other words I sold and I bought.

I think this sums it up, my background.

Q. Fine. And in buying photography throughout your career, from whom would you buy the photography?

A. When you say buying photography, we're talking now about buying already taken pictures. Because in the other field, which is assigning photographers, that is a completely different ballgame if you will. You buy it from stock houses, agencies, wire services and at times you don't buy it, you get free pictures from various sources, whether **[379]** they be U. S government sources, tourist offices, museums, what have you.

Q. Did you continue your buying process up until the present?

A. Up until last year when I finished the last project, yes.

Q. Sir, have you during the time, both as an employee of Time-Life or as an independent employee with Magnum, become familiar with situations where photographs have been misplaced or lost by—

A. Yes.

Q. —purchasers of photographs?

A. Yes.

Q. Have you had to deal with those photographs?

A. Yes, I have. I came across it at Magnum where some of our pictures got lost by one picture magazine. And it happened once. And we were annoyed and it happened a second time and we were quite exercised about it.

And we then, with our attorney, Howard Squadron, devised something to scare everybody out of their wits and we demanded $1500 in damages, which in those years, we are talking now of the early 60s, represented about one month's salary of a picture department clerk. And was supposed to put the fear of God into everybody and it did.

We never did get the $1500, but they paid a lot **[380]** of attention to this later on.

Q. You say you never—

A. And this $1500, whatever Magnum does usually is does by others so it became tradition in the picture business.

Q. Are you familiar with the custom and practice in the magazine industry—

A. Well, I was part of it for 40 years.

Q. —as to compensation paid for photographs for lost slides?

A. Yes. The compensation, at least in my experience when I had to deal with it, depended on many, many factors and was obviously subject to negotiation.

Q. What are those factors?

A. If you, as a client of mine, lost something, it depended how good a client you were: Did I really want to risk losing you as a client by exacting the last ounce of flesh, or did I want to come to a reasonable agreement with industry?

Q. Is there a standard practice?

A. Not in my experience.

Q. And have you discussed this with others in the industry?

A. Oh, it's generally known.

Q. What is generally known?

[381] A. It's generally known that everything is up to negotiation.

Q. That there is no standard practice?

A. There is no standard price list or anything.

Q. What are the parameters that you take into consideration in reaching this negotiated price?

A. In reaching the negotiated price, the parameters are really my relationship with a client, his ability to pay and my clout with him. I'm afraid it's very primitive, it's very basic.

Q. Does it have anything to do with the subject matter of the picture itself?

A. Obviously if somebody lost a picture by Cornell Capa, I would have more of a leverage than if somebody lost a picture of my own.

Q. Does the individual photographer who took the picture, does that person's identity have an effect on how much is paid?

A. It does affect the market value of the property. If it's a name, if it's a big name, internationally known, outstanding photojournalist, that's one price. And if it's a very good, talented, but not internationally known photographer, it's another one.

Q. Now, sir, did you have an opportunity to review the work of Mr. Gasperini?

[382] A.Yes, I did.

Q.What have you had an opportunity to review?

A.I reviewed with you in the offices of Mr. Gasperini's attorney a selection of photographs and I think I spent about two and a half or three hours looking at them. I didn't really count them. But there were several big shopping bags full of colors, color slides.

Q. Thousands of slides?

A. I would imagine so. Easily.

Q. Did you review anything else with regard to this matter before the court as far as Mr.—

A. I was shown a video cassette and I reviewed the video cassette which I believed was the product put out.

MR. MONTBACH: Do we have that video here?

MR. S. ABADY: Exhibit 10, your Honor. It's here somewhere.

MR. MONTBACH: I have a copy of it, your Honor.

THE COURT: It's in evidence here. The jury has seen it. We'll find it for you.

Q. Did you review anything else, sir?

A. I also saw the list which you gave me out of Mr. Gasperini's deposition of the situations covered during the time that he took the pictures which were lost.

Q. Is this the video which you reviewed, sir?

A. Yes.

[383] Q. And it's composed of still pictures and video?

A. It is composed of motion pictures plus some stills.

Q. Now, have you, as part of your position and your experience, had to determine the value of pictures?

A. Well, in buying rights to pictures, you automatically determine their value to you for your own particular project.

Q. Would you tell us how you do that?

A. You base it, wearing my hat as a buyer now not as a seller, I based it on the money that I had available for any given project. Obviously these, published by Time-Life, I had quite a considerable picture budget I could spend. So I would have valued pictures for this particular project more highly or I would have paid more. I don't want to use the word value, a value judgment is very subjective, but I would have been able to pay more for a picture used in this than I would have been if I had been doing a textbook, for instance, which is a much smaller picture budget.

Q. And what is the range of prices that you would be able to pay?

A. If I were to do a textbook, which uses a great many pictures, of course, but on a very stringent budget, I probably wouldn't be able to pay more than $50 a picture, maybe exceptionally 75. This doesn't sound like much but [384] those are, alas, the facts.

For these projects here, I would pay up to $300, at times 350 maximum, for full page use and if it's less than full page, less.

Q. A quarter page, approximately what would you pay for something like the Life book?

A. About 150.

Q. And would that be to a stock agency?

A. Yes.

Q. And the photographer receives?

A. Well, I would pay to whoever I might buy it from.

MR. S. ABADY: Objection, your Honor.

THE COURT: It's a matter for cross-examination.

MR. S. ABADY: He started a question and the witness starts a narrative.

THE COURT: Please don't both talk at once

THE WITNESS: I'm sorry, sir.

THE COURT: Please proceed.

Q. Dealing with a stock agency, how much would a photographer get of the price that you paid for a stock photo?

A. It depends on the arrangement. At times it's 50-50 and at times a stock agency may take 60 percent or even 70 percent.

Q. So the amount you would pay for a stock photo, [385] $300, $200, $100, a photographer would get a percentage of that?

A. Exactly.

Q. Have you reviewed, you have reviewed the photos in the video and the list?

A. Yes.

Q. Do you have an opinion as to the value of Mr. Gasperini's photos?

A. Again, if you forgive me I will not use the word value.

THE COURT: You' re not going to use the word value, I'm going to tell you not to answer —

THE WITNESS: Well then, what I would have —

THE COURT: Please, one talks at once. Answer the question asked of you. You can't modify the question.

Q. If you were to be putting out a book on Central America in the 80s, the war there, the conflict there, and you were to use, have available to you Mr. Gasperini's photography, what would you have paid for the use of that photography and how would you determine that?

A. Depending on my picture budget, whatever I used of it, I probably would have paid between 75 and $250. It depends on the use, in other words the size, and it depends whether I would have used it at all.

Q. In reviewing the listing of photographs that are [386] missing, were you able to determine, if you were to make a book that we have just spoken of, how many photograph scenes you would have used in such a book?

MR. S. ABADY: Objection, your Honor. That calls for—

THE COURT: I'll take it subject to cross-examination. You can cross-examine as to whether there's any factual basis for the answer.

MR. S. ABADY: Thank you, Judge.

A. Based on the list that I have seen, I think there were eight general situations that might have been of interest. And as I counted on the list, there are 47 slides comprised in those situations.

Q. What types of situations were those?

A. I would have to refer to the notes, if I may. Mostly they were generic situations—excuse me.

THE COURT: Any notes referred to must be marked for identification and may be inspected by opposing counsel.

MR. MONTBACH: Yes, your Honor.

THE COURT: Have the clerk mark the notes.

(Defendant's Exhibit BB and CC were marked for identification)

A. Would you like me to read the check marked situations?

Q. If you can generally tell us what the situations [387] were, the 47.

A. Yes, one example is: "Contras in Nicaragua holding Witness for Peace group and 15 journalists pursuant to orders from"—and here we have the name of the person, etc., etc—"scenes include Contras leading witness people off to boat, walking through forest, etc. Scenes in near small farm house where peasant woman were cooking food, various dramatic

shots of Witness members in state of fear. Scenes on boat. Contras in Chantallas province during peace process. Series documenting the return of Mosquito Indian refugees. Guerrillas walking off with food supplies on patrol. Young Guerrilla being interviewed. Aftermath of battle scene. Charred dead bodies lying on street corner. Bombed out house. Dead Guerrillas. American Green Berets trapped in a hotel."

This is the famous situation in November 1989. I think that about sums it up.

Q. What differentiated those situations from the ones you have chosen, you say you would not be able to use?

A. It's editorial judgment. The others would be probably of considerable interest at the time they were taken but for use now, these pictures are somewhat, like all stock pictures, commodities. So you look at them saying what fits as a generic picture in a textbook or any other book just to illustrate the notion that they are Guerrillas, **[388]** people were killed, etc., etc., etc. and these, in my judgment, fit that bill.

Q. The 47?

A. Yes.

Q. The other ones did not fit that bill?

A. The other ones would be of redundant or of no particular interest.

Q. And you stated that between 50 and $250 would be the price you would pay depending on your budget—

A. Right.

Q. —and the size page it would go on—

A. Correct.

Q. —for the 47 photos. And if you were looking for this type of picture, where would you look for them if you were doing the research yourself?

A. I would look at published material and then, because every editor starts with this kind of photograph or illustration, looks at price, I would start out with the Associated Press, Reuter's, United Press, the wire services which cover these things constantly and have very reasonable prices.

Q. What do you mean by reasonable?

A. I could probably buy any Associated Press picture, and I have, for as big a size use as I want to, for about $65.

[389] THE COURT: Could you do that or do you mean that Time-Life could do that? Do you have to be a member of the Associated Press?

THE WITNESS: No. Absolutely not.

THE COURT: Anyone can go there?

THE WITNESS: Anyone. If you say now, sir, that you are publishing a book and you want to buy this, they are in the business of selling it. You have to be a member of the Associated Press to get the picture taken today by wire photo to you. But once that's done, once the first use is done, it goes into the archives, it's a stock picture and it's available to anybody who wants it.

THE COURT: Thank you.

Q. Go on about your process that you were going through as far as obtaining photographs if you were going to put together a volume.

A. Yes. I would also, because probably my budget wouldn't be big enough to cover all my needs, I would very seriously look at free pictures.

Q. Free pictures?

A. Free pictures.

Q. Where would you obtain these?

A. Free pictures are available, of course, from government sources, whether they be, depending on the subject matter, Department of Defense, national archives, **[390]** etc. Free pictures are available from tourist offices, whether they be in the United States or abroad, embassies, cultural services, airlines.

Q. If you wanted to include pictures of the people, the dramatis personae who were down in Central America at the time, Noriega, Ortega, Arias?

A. Associated Press.

Q. Why?

A. They do this for a living. They take pictures of everything that moves and they have the pictures in every news-

paper that takes pictures. As members of the Associated Press, all these newspapers supply their materials to the AP.

Q. Are the pictures you obtained of sufficient quality to be used in a book?

A. In most cases, yes, certainly. Especially when it's news pictures which we used in the World War II book and others. The Iwo Jima picture is an AP picture.

Q. That is?

A. It is.

Q. It's not a picture that you have to buy rights from a photographer or anything like that?

A. No.

Q. Did you deal with stock houses?

A. Certainly.

[391] Q. And you would deal with stock houses in putting together a book if you needed that type of work?

A. Yes.

Q. And how would you request goods from stock houses, by photographer or by picture subject?

A. By subject matter.

Q. And in your review of Mr. Gasperini's work, have you been able to place a price upon what you would pay for the missing slides?

A. Excuse me, I'm somewhat at a loss.

THE COURT: There's been no objection to the question so your answer is yes I can or no I can't.

Q. Yes or no.

A. I can't. It's too broad. I don't know what you mean.

Q. Would you have purchased all of his 310 slides?

A. No.

Q. So we're back down to the 47 slides you were talking about maximized?

A. Minimum 8, maximum 47. 47 would really duplicate it.

Q. And to you, as a consumer, the other 200 and some odd slides were of no real use?

THE COURT: Is that called a leading question where you come from?

[392] MR. MONTBACH: I withdraw the question.

THE COURT: That's kind of a leading question.

MR. MONTBACH: I have no further questions of this witness, your Honor.

THE COURT: Take a brief recess at this time, members of the jury. Please go into the jury room. You can step down during the recess.

(Recess)

(Jury present)

THE COURT: Okay. Please cross-examine.

MR. S. ABADY: Your Honor 13B and 13D.

THE COURT: The clerk indicates they are not in evidence.

MR. S. ABADY: They were received in evidence yesterday with the testimony of Ms. Kinne.

THE COURT: Hand them to the clerk.

MR. S. ABADY: I can remind your Honor of our colloquy and what you stated as to how they would be received.

THE COURT: 13D was received.

MR. MONTBACH: I think they were admitted.

THE COURT: It's agreed that 13D is in evidence, is that right?

MR. MONTBACH: D and B for a limited purpose.

THE COURT: And I so informed the jury. What [393] about 13B?

MR. MONTBACH: Yes, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. S. ABADY:

Q. Now Mr. De Margitay, in your capacity as a consultant you are aware of the factors used to value photography, isn't that correct, sir?

A. Yes.

Q. And you've suggested that the $1500 minimum industry standard came about because Magnum Photos is the Tiffany of the business and others followed Magnum in using this demand authored by the attorney Howard Squadron. Do you still stand by that position?

A. Yes.

Q. Sir, you've never been a member of the Committee on Valuation of the American Society of Magazine Photographers, have you?

A. Of course not. The American Society of Magazine Photographers—

Q. It's a yes or no question, Mr. De Margitay.

THE COURT: Don't argue.

A.Of course not.

Q.You've never be a member of the committee of evaluation?

[394] A. No.

Q. And you're not familiar with the methodology used by the Committee on Valuation in determining the industry standard, is that correct, sir?

A. Right.

Q. You've never even seen the survey guestionnaire that was presented—

A. Right—

Q. I haven't finished my question—the survey questionnaire that was sent to users in the industry, advertising agencies, publishing companies, stock agencies—

MR. MONTBACH: Objection, your Honor. He's already answered the question.

THE COURT: I think he has answered the question.

Q. You've never seen that document, have you, sir?

THE COURT: Asked and answered.

Q. And Mr. De Margitay, it's true, is it not, that the industry standard is discussed regularly in photographic journalism magazines such as photography magazine, isn't that correct, sir?

MR. MONTBACH: Objection. If he understands the question, sir.

A. I do not understand the question, sir. I specifically deny that there's a standard. I do not [395] understand your definition.

Q. Ever heard the phrase minimum industry standard of $1500?

A. I hear many phrases, sir.

Q. I see.

A. I don't concur with them.

Q. You know what the Picture Agency Council of America is, don't you?

A. Yes, sir.

Q. That represents more than 100 stock agencies in the company.

A. Right.

Q. And it's no accident, is it, that every single stock agency has a delivery memo when it delivers original images to a user?

MR. MONTBACH: Objection.

THE COURT: Sustained as to the argumentative form but he may be asked whether it is true that stock agencies use such a memo.

Q. Isn't that true, sir?

A. Yes.

Q. On every single stock agency's delivery memo there is stated that loss or damage of an original transparency will cost the user a minimum amount of money, the minimum of which is $1500, isn't that true?

[396] MR. MONTBACH: Objection.

THE COURT: If he knows the answer, he can answer.

A. I do not.

Q. Have you ever seen delivery memos from any of these companies?

MR. MONTBACH: Which companies?

Q. Any stock agency?
A. Not in my practice.
Q. Not in your practice. Okay. Now, you were head of a stock agency, weren't you?
A. I was head of a photo agency, yes.
Q. The one you called the Tiffany, isn't that correct?
A. Right, sir.
Q. Magnum Photos. Well, I'll show you what's been admitted in evidence as Exhibit 13B which is a specimen delivery memo from Magnum Photos. Have you seen that document?
A. No, sir. I left Magnum Photos in 1961, 1963.
Q. In 1963, that was before the industry standard Committee on Valuation developed the standard in 1969, isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Overruled.

[397] A. I wouldn't know, sir.

THE COURT: The way the question is asked, it's an argumentative question.

Q. When you left in 1963, the Committee for Valuation and the development of the industry standard didn't exist at the time, isn't that correct, sir?
A. I wouldn't know, sir.
Q. Well, do you still regard Magnum photos as the Tiffany of stock agencies? .
A. I do not concur with the word stock agency, which is putting it down. But I do concur that it is the premier agency in the world, yes.

Q. I ask you to look again at Exhibit 13B and isn't it true, sir, that in paragraph 2, Magnum Photos, the Tiffany of agencies for photographers, demands $1500?
A. Yes.
Q. That's true, is it not?
A. Yes, it is true.
Q. Now, you worked for a long time for Time-Warner, isn't that correct?

THE COURT: Argumentative question. You may ask him how many years.

Q. You worked many years for Time?
A. Yes, indeed.

THE COURT: That's a meaningless question.

[398] What's many years. If you care how long, ask him how long. It's just an argumentative, hectoring guestion. You worked a long time for Time Warner.

MR. S. ABADY: Your Honor is correct.

THE COURT: Just make it simple.

Q. How many years did you work for Time, sir?
A. From 19—I was on salary from 1963 to, excuse me, allow me to refresh my memory here exactly, to 1975.
Q. More than a decade, isn't that correct, sir?
A. Yes.
Q. And Time, as you testified earlier, what you would obtain for a lost or damaged transparency would depend on several factors including your clout, isn't that correct?
A. Correct.
Q. And part of the reason you would have clout at Time is because Time itself is a major user and therefore has tremendous clout, isn't that correct, sir?
A. Correct.
Q. So as an entity with major clout, that is the whole Time empire which represents the source of business for so many photographers in so many magazines all over the world, Time doesn't need to bargain with photographers as to or stock

agencies for lost transparancies, isn't that correct? They have that clout from their buying power?

A. I would imagine so.

[399] Q. Sports Illustrated is part of Time, isn't it?

A. Yes.

Q. I'll show you what's been admitted into evidence as Plaintiff's Exhibit 13D. Isn't it true that Sports Illustrated also demands of an user that an user pay $1500 as a minimum for a lost or damaged transparency?

MR. MONTBACH: Object to the use of the word demand, your Honor.

A. So it states here.

THE COURT: He's already answered. He doesn't want to wait for you to object.

Q. So obviously Time Magazine or obviously Time —

MR. MONTBACH: Objection.

MR. S. ABADY: I withdraw.

THE COURT: Anything that starts off like that has to be an argumentative question.

Q. Isn't it true, notwithstanding Time Inc.'s clout, it still demands that if a user loses one of its photographs from its stock for sports pictures, $1500 as a minimum must be paid, isn't that correct, sir?

A. So you've just shown me, sir.

Q. And you've never seen that before?

A. No.

Q. But you claim to be an expert in matters involving Time?

[400] MR. MONTBACH: Objection.

THE COURT: Sustained. Argumentative.

Q. Mr. De Margitay, when you made those coffee table books that you have in front of us here, you said that you purchased the pictures and orchestrated the project in order to

select the pictures published in those books, did you look at them first?

A. Certainly.

Q. How many pictures are in the book on the Kennedys?

A. Good lord, many thousands. I'm sorry, sir, I'm not prepared to advance a figure.

Q. How many pictures did you look at to select those many thousands?

A. I would imagine that we probably, my colleagues and I we probably looked at 50 pictures for every single picture that went into the book.

Q. 50 to 1.

A. Maybe more. I'm not quantifying.

Q. We'll take your figure. What about the Life History of World War II. How many pictures are in that book?

A. I do not know.

Q. Would it be fair to say that you looked at 50 pictures for every one that you select?

[401] A. Maybe yes, maybe no.

Q. Give or take. Was it more than ten?

A. Sir, we spent two years in making the selection of those pictures.

Q. And you looked at many pictures?

A. Of course.

Q. Now you didn't publish those books—withdrawn. In order to select those pictures, you looked at pictures to select those pictures, isn't that correct?

A. Right.

Q. You didn't look at written descriptions of question.

A. At times we looked at catalogs.

Q. Yes or no, Mr. De Margitay.

A. Yes.

Q. You didn't look at a written description?

A. Yes.

MR. MONTBACH: Objection. He just answered the question.

THE COURT: Wait. Number one, give him time to finish his question.

THE WITNESS: Sorry, sir.

THE COURT: It might not hurt to give the defendant's attorney a chance to object to the question. And let's proceed as rapidly as we can but not in a **[402]** confusing manner.

MR. S. ABADY: Yes, your Honor.

Q. You didn't look at written descriptions, isn't that correct, sir?

A. I did.

Q. But you never saw any of the 310 slides by Mr. Gasperini which were lost by Center—

A. No, of course not.

Q. Now, Mr. De Margitay, you don't sit on the legal committee of the American Society of Picture Professionals, do you?

A. No.

Q. In fact, you don't sit on the legal committee or the valuation committee of any professional photographic organization?

A. Correct.

Q. And Mr. De Margitay, isn't it true that the value of a photograph for Mr. Gasperini or any other photographer extends over the lifetime of the photographer plus 50 years after his death?

A. No.

Q. Isn't that the copyright?

A. Yes. Sir, you used value. Copyright, yes. Value is a different term than copyright as I do not need to tell you, sir, you're the attorney.

[403] THE COURT: Don't argue with the lawyer. Just answer the questions as truthfully and as simply as you can do so.

Q. And Mr. De Margitay, isn't it true that the ability for a picture to generate income to its owner, in this case the photographer, extends over the owner's lifetime—

A. Absolutely.

Q.—and 50 years beyond his death.

A. Yes.

Q. Mr. Gasperini is 39 years old. That means that his pictures have a value for the next 94 years, isn't that correct, sir?

MR. MONTBACH: Objection. He's testifying.

THE COURT: It's kind of a convoluted question but he can be asked whether the pictures have value for that period of time.

Q. His pictures, if sold, would generate revenue for the next 94 years, isn't that correct, sir?

A. If so sold, yes.

Q. 94 years. Now, you've testified—

THE COURT: Whatever he testified we already heard.

Q. And the value from those pictures comes, or from any picture, comes from the owner's right for royalties when **[404]** the picture is reproduced by a user, isn't that correct, sir?

A. Correct.

Q. Now, you mentioned—

THE COURT: Whatever he mentioned the jurors did hear.

Q. Now, as to the famous situation when the Green Berets were trapped in the Sheraton Hotel, there weren't any other journalists that got the shots that Mr. Gasperini got at the time, were there?

A. I don't know that.

Q. You don't know that there were, do you, sir?

A. I do not, sir.

Q. And one of the ways in which pictures are valued, that is the valuation criteria, includes the uniqueness of the photograph?

A. Absolutely.

Q. And another criterion is how the photograph relates to a body of work, of many photographs, isn't that true, sir?

A. Not necessarily.

Q. Have you ever studied anything about the valuation of photography?

A. I'm only a humble buyer of photography, sir.

Q. So you have no expertise in valuation of [405] photography?

A. I set the value. The value, sir, is what I'm willing to pay. The value of your house is not what you say it is, sir, it is what somebody is willing to pay for it.

Q. I see. Now, finally Mr. De Margitay, you said that if you were writing a book on Central America, a picture book like one of these coffee table sized picture books, you would look for free photographs from government sources and the AP.

Now, two questions: You have no expertise on Central America, do you?

A. No, sir.

Q. You know nothing about the history of the region, isn't that correct?

A. No.

Q. You never lived in Central America, have you?

A. No, I haven't.

Q. Do you speak the language?

A. No, sir.

Q. You don't speak Spanish.

A. I don't speak Latin either and I know a lot about Roman culture, sir.

Q. We're not talking about that —

MR. MONTBACH: Objection.

THE COURT: Please don't argue with the witness.

[406] THE WITNESS: I'm sorry.

THE COURT: Just frame the next question.

MR. S. ABADY: Yes, your Honor.

Q. You think a photographer's eye and his knowledge of the region or the indigenous peoples being photographed has anything to do with valuation of his or her photography?

A. Of course.

Q. Isn't it true, Mr. De Margitay, that most AP pictures of the type you mentioned are shot in black and white for wire transfer to newspapers? Isn't it true, sir?

A. Most, yes.

Q. So if you, who have no knowledge of the subject, were writing a picture book on Central America and you sought to use these $65 a piece pictures from AP, those would all be black and white pictures, isn't that true, sir?

A. No, sir.

Q. Isn't it true—didn't you just testify that most AP pictures are black and white?

A. Yes, sir. But if I want color pictures, I get color pictures.

Q. We're talking in this case about exclusively color transparancies, isn't that correct, sir?

A. Right, sure.

Q. Now, some pictures have no value for long periods of time and then gain value as news events or even [407] advertising changes—

A. Absolutely.

Q. —come to the fore, isn't that correct, sir?

A. Yes.

Q. Some pictures, particularly about historical events, have recurring value as a story becomes current in the news, isn't that correct, sir?

A. Correct.

Q. And historical pictures can be used in many different contexts, isn't that true?

A. Correct.

Q. They can be used in textbooks, isn't that true?

A. Sure.

Q. They can be used in educational videos, isn't that correct?

A. Right.

Q. They can be used in magazines?

A. Um-hmm.

THE COURT: No um-hmm. No good. Yes or no.

A. Yes, sorry, sir.

Q. They can be used in newspapers and they can be used in books such as the book you have there, isn't that correct?

A. Yes, sir.

Q. You're familiar with the photojournalist Margaret [408] Burke-White, are you not?

A. Very much, sir.

Q. She's one of the most famous photojournalists ever, is that correct?

A. Yes.

Q. And she worked for Time-Life?

A. Yes.

Q. And in her career as photojournalist, she wrote books about each stage of her career, isn't that correct?

A. Yes.

Q. When she took pictures of starving Americans during the Dust Bowl Era that was a book?

A. Absolutely.

Q. When she took pictures of the developing industry under Stalin, that was a book?

A. Yes.

Q. When she took pictures of the Indian independence movement, that was a book in the late 1940s, isn't that correct?

A. Yes.

Q. Were you ever informed by counsel for the defendant that Mr. Gasperini also intended to write a book, a retrospective synthesizing his years of experience in Central America?

A. Yes.

[409] MR. S. ABADY: I have no further questions, Judge.

THE COURT: Any redirect examination?

MR. MONTBACH: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MONTBACH:

Q. Mr. De Margitay, having reviewed the slides of Mr. Gasperini's in his counsel's office, the listing of slides and the video, do you have an opinion as to whether the 310 missing slides each have an individual value of $1500?

A. Yes.

Q. What is your opinion?

A. They are not.

Q. Why not?

A. Because the subject matter is so general that whereas when he took these pictures they could have been agented to his profit, at this point in time commercially they are competing with readily available, extremely inexpensive photographs.

Q. You have stated your opinion of the value of the 47 slides on the list. Do you have an opinion as to whether the remaining 263 slides have any commercial value?

A. Yes.

Q. What is your opinion?

[410] A. Very, very little.

Q. What do you mean by very, very little?

A. You want me to put a dollar value on it?

Q. If you could.

A. If an agent, would be very lucky, I would say over a period of ten years, maybe $150 or $200.

Q. Per slide?

A. Per picture, yes.

Q. Counsel used the term—

THE COURT: Whatever he used they heard.

MR. MONTBACH: I have to use the word, your Honor.

THE COURT: Ask him if he understands the meaning of the word X.

Q. Do you understand in the context of slides being sold if they "would" generate a certain amount of money as opposed to "could" generate?

A. Right.

Q. Were you responding if these were sold they could possibly generate money, not positively they would.

A. Indeed. It's possible but not probable.

MR. MONTBACH: Thank you. No further questions.

THE COURT: Anything else for the witness?

MR. S. ABADY: Yes, your Honor.

[411] RECROSS-EXAMINATION

BY MR. S. ABADY:

Q. Mr. De Margitay, for those slides you wouldn't choose of Mr. Gasperini's to put in your hypothetical book on Central America, you say those are worth about $200 apiece. Isn't it true, sir, that you previously testified here today that you paid up to $350 for one time use of photographs, general photography?

A. May I be allowed to clarify?

Q. Did you say that, yes or no.

A. Yes.

Q. So we're talking about a one-time use. Is it your testimony, sir, that the $200 for the slides that you determined to be of little value is the revenue that would be potentially generated over the next 94 years?

MR. MONTBACH: Objection.

Q. Is that your testimony?

THE COURT: Overruled.

A. Yes.

Q. Over the next 94 years you are saying, you are prognosticating that the subject matter of Central America in Mr. Gasperini's slides would only be used one time in video educational films, magazines, games, is that correct, sir?

A. Yes.

[412] Q. How much are you being paid for your testimony here today?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. My rate, sir, if you ever want to use me, is $100 an hour.

Q. $100 an hour. How many hours have you worked for the defendant's law firm on this matter?

A. I think five hours so far. Not including the court.

Q. Have you ever worked for that law firm before?

A. Several years ago in one instance.

Q. This is your second employment by them?

A. Yes, sir.

MR. S. ABADY: No further questions.

THE COURT: Anything else for the gentleman?

MR. MONTBACH: Nothing else, your Honor.

THE COURT: Thank you, Mr. De Margitay, you're excused. indulgence.

THE WITNESS: Thank you, sir. Thank you for your indulgence.

(Witness excused)

THE COURT: You don't need those books. They're just ordinary books you'd have on a coffee table published by Life Magazine.

[413] THE WITNESS: Little Brown, actually.

THE COURT: All right.

MR. MONTBACH: No further witnesses.

MR. S. ABADY: Nothing from the plaintiff, your Honor.

MR. MONTBACH: The defendant rests.

THE COURT: All right. Members of the jury, please step into the jury room for a moment. Keep an open mind and don't discuss the case.

(Jury not present)

THE COURT: The record will show that both attorneys are deemed to have made all motions permitted by the rules and the court has either denied or reserved decision as to all such motions.

MR. S. ABADY: Except, your Honor, you granted the Rule 50(a)(2) motion on liability.

THE COURT: That's never been an issue except maybe in your mind. The only thing the jury has to do is figure the value. The court instruct them generally on their duty in determining credibility and the like, and damages they are to compensate and make the plaintiff whole to the extent that money can do so for his loss, and they can't be the subject of speculation, they have to determine them after due deliberation based on the evidence and they can't be arbitrary, they have to use sound discretion and **[414]** not consider speculation or sympathy or anything like that.

The court will tell them that they may take into consideration fair market value of the property loss, the time and place of the loss, and that's the price which a fully informed and willing owner under no compulsion to sell would have voluntarily sold, and a fully informed buyer, under no compulsion to buy, would have voluntarily paid for all the rights of the owner in the 310 slides which are lost.

And I will tell them in considering market value, they may consider all of the facts in the case in evidence, without limiting the scope of that; they can consider the ability of the photojournalist and his reputation; his prior licensing fees collected from his pictures; the extent and nature of his efforts to exploit these pictures and other pictures; the content and subject matter; the potential competitive or alternative sources of pictures available to users; the nature of the demand for the use of the pictures.

They may discount their damage award for the length of time it would take to sell or otherwise dispose of the transparancies. They may reduce the value for the cost of merchandising either by a stock agency or any other ordinary business means which they find to be reasonable.

The court has already given a cautionary instruction on the so-called industry standard. I will tell **[415]** them that it's not applicable in this case because there is no delivery ticket incorporating such a provision. They can consider what others do as they find from the testimony for whatever evidence or whatever assistance it gives them in reaching their conclusion.

As to anything requested in writing which is not given in substance, each of you have a preserved exception without the need of taking it again. But that's a general indication to aid you in your closing arguments of what the court intends to tell the jurors.

Now, is there any problem or any open issue which you want me to address at this time on the subject of the jury instructions?

MR. S. ABADY: Yes, your Honor, two issues. One, we would request the court also instruct the jury that independent of market value, that the slides have an intrinsic value; that they may take into account the meaning of the loss to Mr. Gasperini in light of his life plans, in light of the efforts that he went to to obtain the pictures.

THE COURT: I will include his possible use of the slides in a book as one of the items that they may consider. But on the rest of it, I decline to charge and you may have an exception as to that. The court views this case as a commercial transaction between a publisher and a photojournalist and that these slides, as stated by one of **[416]** the witnesses, are essentially a commodity, and while it's very unfortunate that they got lost, they have no intrinsic value apart from the money that can be derived from them over their life as a property.

MR. S. ABADY: Will you instruct the jurors also that in making that calculation they should take into account that the value is over the lifetime of the copyright, Mr. Gasperini being 39 years old.

THE COURT: They've already heard that. I don't have to tell them that. But I will tell them the life of the copyright.

MR. S. ABADY: And the second issue, which I forecasted to some extent in my requested instruction submitted to you, has to do with the fact—

THE COURT: I want to make it clear that I'm clear on the intrinsic value. This case is distinguished from the case where Aunt Tillie's picture is lost by the moving van and where the

picture has no value except to the family. This is a commercial transaction, and that's why I'm differentiating those cases.

MR. S. ABADY: I accept your understanding, your Honor. I'm also asking you, your Honor, to give an instruction, which I believe I included in my requested instructions, but let me just go to it and then I'll see—

THE COURT: Just give me the subject matter that [417] you want covered.

MR. S. ABADY: The defendant was in a position to produce documents in its files and produced only the front pages of critical documents, thereby hiding the fact that it had in its possession the knowledge over a period of years, through its course of dealing with various stock agencies, its knowledge of the industry standard.

THE COURT: I decline to so charge.

MR. S. ABADY: I would like an instruction to the jury that where a defendant, where subpoenaed material was not produced and the defendant was in the best position to produce that material, they may draw an adverse inference from the failure to produce the material.

THE COURT: Declined in the context of this case. The court believes that you've had a full and fair opportunity to present to the jury all of the elements which pertain to the value of your lost property. That would be an unduly prejudicial and unfair instruction in the context of this case and it's declined. Are you otherwise okay?

MR. S. ABADY: I believe I am, your Honor.

THE COURT: Did you have anything?

MR. MONTBACH: No, your Honor. You already dealt with the industry standard.

THE COURT: Industry standard is a little difficult because as the proof developed in this case, [418] there's really far less evidence that the industry standard exists except for certain lower court New York State cases. Every one of those cases is distinguishable on the ground that in those cases, where recovery was allowed based on the industry standard, they signed for or received the delivery ticket and the delivery ticket by the conditions on the back of it became the contract of the parties rather than an industry standard.

So hindsight, the court probably would have been better off to have excluded it. But in any event, it's clear that this plaintiff didn't send the delivery ticket. And the parties never agreed to be bound by the industry standard.

It does show the existence of this provision and its history, which has been fully gone into with the witnesses, does show that the stock agencies recognize that every print has some value and that the value is hard to determine. I don't know that that adds much to the case.

MR. S. ABADY: Your Honor recalls the testimony of Mrs. Kinne that in fact throughout the industry in almost all cases the industry standard is observed.

THE COURT: But it's not. It's a basis to start the chiseling. It's all a negotiation. The testimony is clear on that. This plaintiff did not pay the full amount last time it lost slides and the last witness gave very [419] believable testimony that the good will existing between the parties, the so-called clout of the customer or other extraneous factor is just honored in the breach.

MR. MONTBACH: And your Honor—can I please make a statement here.

MR. S. ABADY: If interruption is going to be the rule of the day, make your statement.

MR. MONTBACH: We have presented you with appellate level decisions from New York State courts which say there is no industry standard of $1500, no custom and practice, that you have to look to the uniqueness of the slides and the earning power of the photographer.

THE COURT: But it's an issue of fact.

MR. MONTBACH: I think it's an issue of law.

THE COURT: It's an issue of fact whether an industry standard exists. But the evidence in this case is very clear that there is no industry standard. And if there were, these parties did not agree to be bound by it.

MR. MONTBACH: Certainly, your Honor.

THE COURT: I think I decline to tell the jury that.

MR. MONTBACH: We think it will prejudice the jury.

MR. S. ABADY: Mrs. Kinne's testimony, I think you'll recall, which the jurors can infer from the other **[420]** testimony, that since Mr. Gasperini did not transmit these slides to the defendant but went there, got paid separately to work with them and edit them, that there would be no need to in effect send a delivery memo to himself and the only reason he left them there was because he was called away to the Persian Gulf and because he's not a lawyer and not a sophisticated guy he didn't think, legally, wait, I'm leaving—

THE COURT: The law is the same for people who are not sophisticated.

MR. S. ABADY: They still have possession of my property. I better get them to sign a liquidated damages clause.

THE COURT: He didn't. Are we covered now on this?

MR. MONTBACH: Nothing further.

THE COURT: How long will your summation be?

MR. MONTBACH: Ten minutes.

THE COURT: And yours?

MR. S. ABADY: 20, 25 minutes, your Honor.

THE COURT: All right. Well I think my problem is that I will have to leave for Manhattan in about 45 minutes. What I propose to do, I'll go down there, I'll probably come back here by 2:30 or 2:45. I think what I would like to do is to hear the closing arguments while I'm **[421]** here and presiding.

Then I propose to have the clerk, in your presence, in open court, simply play the videotape which is in evidence, Exhibit 10. And then send the jurors to lunch.

I don't know how long the videotape runs.

MR. S. ABADY: The three videotapes are 20 minutes apiece.

THE COURT: That's about 60 minutes.

MR. S. ABADY: The total is 45 minutes, I'm sorry. What is the purpose? It's not adverse to our case, but what's the purpose of playing the videotapes?

THE COURT: What's the purpose of offering it in evidence? You see, if it's in evidence, an appellate court reviewing the case has the right to assume they saw it. I would ordinarily play it in open court in my presence but there's a meeting of the judges. If you want me to send them for a two and a half hour lunch, I can't see how that's in your interests. Can't you both sit here and be quiet while it's played.

MR. S. ABADY: In the interest of time we could even dispense with the playing.

THE COURT: Then you'll withdraw it as evidence.

MR. MONTBACH: I would like to see it played.

THE COURT: I would think so. It was offered as some good faith evidence to help them value the slides **[422]** because some of the slides are on the videotape. I don't now why, it astounds me that you would offer an exhibit and then not insist that the jurors see it. And they can't very well see it in the jury room without a projector.

MR. S. ABADY: It was the fact of its manufacture that was significant, not the content.

THE COURT: They're trying to assess, I assume, the value and quality of 310 pictures.

MR. S. ABADY: Which you cannot do from video tapes which is why we mounted photographs in Exhibit 18.

THE COURT: I think it's in evidence now and I think I ought to play it.

MR. S. ABADY: As you wish, Judge.

THE COURT: I just propose to telescope the time by going to New York while it's played and I assume none of you have any objection to that and you'll both maintain cordiality in my absence.

MR. S. ABADY: Absolutely, Judge.

THE COURT: All right with you, Mr. Montbach?

MR. MONTBACH: Yes.

THE COURT: Thank you, all.

(Recess)

(Jury present)

THE COURT: Members of the jury, let me tell you about scheduling.

[423] As soon as I finish speaking, you'll hear the closing arguments of the attorneys. As I mentioned earlier, that's not evidence. It's in the same vein as the opening statements.

The attorneys will discuss the evidence that been received and argue the basis for drawing certain inferences from the evidence and will ask you to reach certain conclusions as jurors. Because the plaintiff has the burden of proof on the issue of damages in this case, the plaintiff has the right to open and close and therefore the defendant's attorney will go first in the closing arguments.

After the closing arguments, the court is required to be in Foley Square for the monthly meeting of the court. I'm going to go down there and come right back as quickly as I can. But to make the time work out better for all of us, it's been agreed that these videotapes which are in evidence, Exhibit 10, will be played for you here by the clerk in open court. You won't be able to view them in the jury room and one of the things that you do in jury deliberation is to look at the exhibits and consider them.

So the clerk will play the videotapes for you in open court. The rest of the exhibits you'll have with you in the jury room when you deliberate.

As soon as the tapes have been played, the lawyers will be here but nobody is to say anything. You're [424] just looking at the tapes. No comment by anybody. And you shouldn't say anything to each other while you're watching the tapes.

As soon as Ms. Bravato is finished playing the tapes, she will excuse you for lunch and you will come back to the jury room at 2:30 and at that time I'll give you the court's instructions as to the law. So when you come back from lunch you're still under the instruction of the court not to discuss the case and keep an open mind until you hear the court's instructions as to the law. And then and only then you'll deliberate on your verdict.

Do you all understand what I've just said? Is there any problem with any of that?

All right, Mr. Montbach.

MR. MONTBACH: Thank you, your Honor.

At the outset of the trial of this case I asked to listen to all the testimony and to apply your common sense to it in order to determine the amount of compensation which may possibly be due to Mr. Gasperini for the loss of his slides. At that time, I stated to you that we would show by expert testimony that the market value of the slides was significantly lower than the amount being sought by the plaintiff in this case, certainly nowhere near the million and a half being sought in the complaint.

We have done so and I submit that plaintiff has [425] not introduced any credible evidence to counter the evidence produced to you by Mr. De Margitay concerning the salability, the commercial value of the 310 slides which are missing.

You've been presented with two choices. Mr. Gasperini's witnesses would have you believe that each and every one of the 310 missing slides had a minimum value of $1500, no matter what they depicted, no matter what the market was for them and no matter how many other photographers took pic-

tures of the same scenes and have those available in the marketplace for use. It's just not logical, ladies and gentlemen.

Mr. Gasperini himself testified he had no intention of even attempting to earn any money from these photographs. He was keeping them in his mother's house in cardboard boxes, he was not trying to earn any money from them because he wanted to use them at some unknown time in the future to write a book about his own experiences.

That book may have been very interesting. We have no testimony as to whether there's a demand for such a book, as to how many pictures would be in such a book, as to how much it would cost to make such a book or how much — in fact, there was testimony that no one had ever approached him other than friends who said he ought to write a book about his experiences. It may be very interesting.

[426] We had testimony, counsel asked about a certain photographer, Margaret Burke-White. I don't know if you know of her. I do. She is a very infamous photographer, one of the best in the world.

Mr. Gasperini is, we admit, a credible photographer. But he is not a Margaret Burke-White. I may be killing her name, I'm sorry, if I am. Mr. Gasperini wants you to believe that with 4700 some odd pictures still in his collection, he cannot write that book or if he can write that book that he can't use those pictures that he has or get pictures that would illustrate what happened when he was down in Central America at the same time.

You also have heard a lot about perspective things in the future, possible CD ROM uses, possible high technology uses. We don't know what they are. We're having speculation as to what may be in the future. What would have happened if the slides hadn't been lost.

We have a measure of that here. Obviously if they would have been returned in 1991, Mr. Gasperini would have already missed the prime earning years. In the 80s and early 90s, that was when news of what was happening in Central America was in the forefront. Yet he chose to keep his pictures in the closet.

If he had those 310, what would he have done. His own testimony is he would have had them in the closet. **[427]** They would not have earned him any money.

Now by your own common sense you know that there's no real demand. Mr. De Margitay said it. There's no real demand for these kinds of pictures. Central America is old news. It's not D-Day. We're coming up to the 10th anniversary of many things that happened in Central America. Do we see a big demand of things that happened to the Mosquito Indians or the Witness for Peace. No. There's certainly no retrospective calling for his slides to be used over and over again.

During the years before 1991 Mr. Gasperini chose to his own reason not to market his slides. That's his choice. During those years he earned an average of less than a thousand dollars a year from the sale of his photos to Central America. In fact most of the money, as you heard, came from our organization. From other organizations I think the most he ever got was $2,000 for a CD ROM video game. Other than that he was earning approximately 2 to $3000 a year from his photography. Yet he and his experts would have you believe these slides are worth a minimum of $450,000.

It's not logical. Probably the best indicator of what the slides are worth is proven by the earnings he has received from the slides of the Gulf War that he did place with a stock agency, Impact Visuals, one of the agencies **[428]** that says it's worth $1500 each. They also did an edit. He testified that his brother gave the slides from the Gulf War to these individuals. They edited them down to almost the same number of slides that *were* given to Guidance associates. I think his testimony was around 240, 250 slides are still with Impact Visuals of the Gulf War situation.

Those best slides, just like the 310 that he gave to us supposedly, over the past years have earned him a total of $366. Of those 240, 250 slides only seven slides have ever been able to be sold to anyone and none of them have repeated.

The average, you'll be able to figure it out, of his earnings from that, not what they charged, the average he earned is about $50 a picture. About the same price that he got when he

sold these pictures originally to In These Times magazine and the other people.

His own testimony was that they sold him $50 a picture. And those pictures which are out in the public domain people can look at. For pictures like Witness for Peace, Mosquito Indians, he's never had anybody get in touch with him through the papers or anyone else to use them. There is no demand.

Remember if the tree falls in the forest, that nobody is there to hear it, does it make a noise. If he's **[429]** got 310 slides which are pretty good in the closet and they don't have any sales are they worth really very much at all. It's a very speculative thing.

Using the $50 rate that he has accomplished or was used to earning over the last ten years for the use of his slides, if you multiplied that by the 310 slides that were missing generously he would earning $15,000. That's what the value of those would be. If you say that half of those again were reused at another $50 a picture, you add on another $7,000 or so, maybe he would earn, they would have a value of around 20, $22,000. A figure which is over twice the amount he has earned in his life from all his Central American pictures.

If added up, and I did, the figures that he gave for his earnings from Central American pictures, including the money he received from Guidance Associates, including the $3500 payment that was not called for in the contract but was made by Guidance Associates out of a feeling of responsibility because he put a lot of money into it and it was not earning very much money for him, his earnings over the last decade are under $10,000 from his photography.

Yet he would have you give him $450,000 from the loss of those 310 slides. It's like winning the lottery. Those slides seem to be worth more lost than they would be if they hadn't been lost.

[430] In fact, we have produced here, in evidence, and you can look at it, his own count, a hundred slides that are duplicates of what was given to Guidance Associates. Those are available today.

MR. S. ABADY: Objection, your Honor.

THE COURT: I'm sorry.

MR. S. ABADY: Objection.

THE COURT: The juror's recollection of whatever the evidence shows controls.

MR. MONTBACH: Those are available to him. Now, we had two experts here, or two main experts. There were some other people testifying who maybe characterized by the plaintiff as expert testimony. Ms. Kinne, who makes a habit of testifying. I think she testified that she has been in at least 70 cases. She's a professional witness on behalf of photographers.

She testified that the only value that she could think of for those pictures was this knee jerk $1500 for each and every one of them despite the fact, and she based on the fact in her testimony that Mr. Gasperini did the edit and this made these 310 pictures or 300 pictures, we should get these two separate here, 300 pictures special and worth $1500, and the fact that the other ten, which were edited by Mr. Gasperini's mother, or chosen, she still says those are worth $1500 each. She doesn't know what they're of but just **[431]** because they were taken and they're involved in this case.

Mr. De Margitay, however, who has a vast experience in buying pictures, and knows the marketplace, gave you a true picture of the commercial value of the slides. He didn't say they were all totally worthless. We're not making that argument to you. We wouldn't. We'd be foolish to do that.

He said reviewing the slides, reviewing the videos, reviewing the 4700 some odd slides that were shown to us and reviewing the list of the 310 or 300 that are on that list, 10 are not described, 300, he saw eight separate scenes, if you will, of which there were 47 pictures, that he could see as having a commercial value to be used in a book, by any magazines, newspapers, whatever. And he said the high price that he would pay for those, if he had a good budget, was $250. In all likelihood, and obviously you're going to negotiate it down when you want to get something depending on your budget, 50 to $100.

With regard to the remaining 263, he said they virtually had no commercial value. They could be obtained anywhere. There were plenty of sources for $50 or less that you can get those.

Not denigrating Mr. Gasperini's pictures, his ability or anything. The fact remains as you know and as the court has says, there were dozens, hundreds of [432] photographers down there. You saw the newspapers. On a daily basis there were pictures. We have National Geographic with pictures down there. You heard the name James Nachtway, a recognized award-winning photographer was down there taking pictures. Those are available.

Mr. Gasperini's pictures are in his mother's home. They were never out there. They may have had a value, they don't have one now and they certainly weren't buying merchandised.

I ask you in closing, please don't speculate. Use your common sense. It's a shame that the slides were lost. No one meant to lose them. This is not a question of our trying to get rid of his slides or anything like that, we just feel he should have a just compensation given his earning power. It's our position that those slides were not unique. Some could be used. Most couldn't. Unfortunately by his own choosing Mr. Gasperini has not determined any significant earning power. He has been paid 50 to 100 a slid for a few of his slides, but he certainly is not in the range of $1500 per slide for every picture he takes.

Thank you, very much.

THE COURT: Thank you, sir. At this time Mr. Abady you may make a closing argument on behalf of Mr. Gasperini.

MR. S. ABADY: Thank you, your Honor. Ladies and [433] gentlemen of the jury, on behalf of Mr. Gasperini first I wish to thank you for your patience and attention in this matter. As this Mr. Abady told you in the opening statement, this case is very important to Mr. Gasperini. It's very important because seven years of his life's work, seven years of his living abroad, seven years of working and living in a country

whose language he trained for and in which he wrote for foreign press as well as writing in English, seven years in which he captured the images of civil war and its impact on families, on children, on poor people in the region, on politics, seven years in which Mr. Gasperini at times even risked his life and saw the death of one of his colleagues, seven years in which he hoped to synthesize into, for him, a definitive work in pictures on the history of Central America, seven years is now gone.

We ask you to think first of all what it would mean to you to work that long and that hard with the dedication and the sacrifice that Mr. Gasperini invested and to lose all of that because a company, which is in the business of using photography, which since 1961 made millions of dollars exploiting still shots, slides and negatives for its business, primarily the making of educational film strips, a company which has in its own stock 10,000 of such slides, that a company according to its [434] president had no policies or procedures for safeguarding seven years of Mr. Gasperini's life, a company which was utterly cavalier in the handling—

THE COURT: Talk about the value. The case is limited to the value. The verdict is not being given to punish anybody for being cavalier. Just talk about the value of the lost slides.

MR. S. ABADY: I am, your Honor. This is a part of it.

Ladies and gentlemen of the jury, in his opening Mr. Montbach was saying, said to you that he did not deny Mr. Gasperini's pictures are good or that he should not be compensated. In his closing he's telling you well, compensation may be due. What happened to the equivocation, how did his case suddenly change from beginning to end?

Well, he said to you in his closing that our evidence was not credible. I'd like to review that evidence with you. What do we know and how can we determine the value here.

Well, the best way we can determine value is not simply by what Mr. Gasperini has done to date, because you heard the undisputed evidence that the copyright, that is his right to earn from his lost photographs, extends 50 years beyond the

time of his death. That's 94 years. The potential reproduction of his work can last for the next 94 [435] years. Now, the witness De Margitay, and recapitulated in the closing of Mr. Montbach said well, look at what Mr. Gasperini has done to date. To date Mr. Gasperini is only 39 years old. To date Mr. Gasperini had not had the chance to write and will now never have the chance to write his book on Central America. And to date we know from the testimony of the witnesses that photography has recurrent value as was admitted by the defendant and as we saw from the testimony of Mr. Bob Zentmaier who owns Photo Researchers Inc., a company that has more than a million original slides in its inventory, there were pictures in that inventory 50 years old that-were suddenly on the front pages of newspapers and in magazine feature articles showing ordinary GIs landing on Omaha Beach on D-Day.

That's the nature of photojournalism. It has a recurring value and the value recurs precisely as history and events change, and as those changes are recorded in the media, in textbooks, new technologies.

I was interested to see Mr. Montbach say that we speculated on the technology such as CD ROM use that may have value for Mr. Gasperini. That was no speculation. Sitting on that table in front of you are two packages of software, two packages of software for which he was paid several thousand dollars. So that's not speculation either.

[436] Ladies and gentlemen, one good way to determine the value of these photographs is what the defendant knew about their value. Mr. Gasperini is a photojournalist. But the defendant is an user of photographs. And only until the very recent years where it used photographs and videotapes, all of its product was from photographs, was from photography. The defendant was a major player in the business, a major consumer of this kind of goods.

And what did the defendant do? Mr. Goodman searched high and low. He had every single person of a 40 member staff search his entire premises to find these photographs. He searched his storage facilities. He temporized and delayed in even informing Mr. Gasperini or his mother that they were

actually lost but admitted on the witness stand that the earliest date of the loss was August of 1991 and the judge will instruct you as to the significance of fixing a date as to any interest that may be due.

THE COURT: That will be done by the court. That's not a matter for the jury. The jurors don't need to concern yourself with the date.

MR. S. ABADY: Thank you, Judge. So he admitted that he knew of this loss in August of 1991 and yet it was never definitively conveyed to Mr. Gasperini until the letter dated December 15, 1992.

[437] Now, why would the defendant wait a year and a half before admitting that this property was lost?

MR. MONTBACH: Objection.

MR. S. ABADY: Because the defendant knew that it was valuable.

THE COURT: He's making an argument that he knew it was valuable.

MR. MONTBACH: Mischaracterizing the testimony, your Honor.

THE COURT: Well, the jurors' recollection of the testimony is controlling over anything that the lawyers or I might say.

MR. S. ABADY: How did the defendant know it was valuable? Because throughout the photographic industry, there is a minimum industry standard. Now, what does the word standard mean? It means an average. What is the average based on? It's based upon the projected potential use and reproductive royalty generation of any photograph. That's the nature of an average.

Are we saying that each and every one of Mr. Gasperini's photographs, 310, would have generated $1500 and not $1499 or $1501? No. It's an average.

Some of his photographs may have generated more, a great deal more, over the next 94 years. As Mrs. Kinne told you, a picture of an eagle that sat in stock at Photo [438]

Researchers for years and years and years generated $20,000 simply when the post office used it on the cover of its Express Mail packages.

So an average is based upon potential use which can now never be realized because the defendants lost or destroyed the photographs. That's the whole point of an industry standard.

What the defendant is asking you to do in this case, it's asking you to give it a discount for its own carelessness. What it's telling you is that you cannot take into account its superior knowledge of the industry standard reflected in its own records in dealing with stock agencies, Magnum Photos, Photo Researchers, all of which put the minimum standard on there. That its knowledge of that standard should not apply to Mr. Gasperini because he didn't go to Columbia Business School, he studied rural sociology and when he was suddenly called away to the Gulf War he didn't stop and think: Hmm, these photos which are in my possession at their premises and which I'm editing for the video I must now leave exclusively in their possession and I better get them to sign a clause showing their acceptance of the industry standard which they've known about for years, because otherwise if they lose my property then I won't have that additional contract term to bind them with.

They want you to give them a discount for what [439] would otherwise be expected of them in their dealings what all other commercial agencies that deliver the type of photography that Mr. Gasperini and his colleagues deposit simply because he got called away suddenly to photograph the Gulf War and he's not an experienced businessman like Will Goodman. He's a journalist.

I don't think they're entitled to that discount. I don't think they should be rewarded since they clearly know what is in the industry because of those circumstances.

Mr. Montbach mentioned to you Mr. Gasperini's photography is not like James Nachtway's photography which he published in National Geographic. Who is James Nachtway alone with in Central America taking pictures with? With Bill Gasperini. Who knows quality photography? Well, we have

submitted to you in Exhibits 18, I believe it is A through I, examples of his pictures. Fine quality pictures. They're not the kind of pictures that we as tourists take on vacation. I don't see U.S. helicopters doing food drops in Somalia and capture that dramatic moment. And I'm sure none of you do unless you're very special. I wouldn't have that for posterity or something that I could sell.

Mr. Gasperini's experience is unique. It has to be unique. Most of us don't risk life and limb to record the history of the most important actions of our times in world history. A man who has been everywhere on the globe [440] except Australia and Antarctica and taken pictures.

There's been a theme that Mr. Gasperini has been a photojournalist but he's not really a photographer. Or in the alternative, that he's a photographer and he's got so many pictures he doesn't need this 310 so you shouldn't really compensate him more than the amount suggested by Mr. Mount back. The truth is as Mr. Gasperini and Mrs. Kinne told you and this was not refuted by the defendants' paid outtakes expert, is that outtakes, shots you don't use, the hand is in front of the lens, the subject matter is not the same, makes all the difference in the world.

Mr. De Margitay told you not of outtakes but of pictures submitted for a book, that it was 50 to 1 in the next editing process to put those pictures in a book. If it's 50 pictures, if you discard 49 pictures to find the one that is publishable in a book with thousands of pictures in it like the two coffee tables he had on the witness stand, one of the Kennedys, one of World War II, then Mr. Gasperini's final edit of seven years worth of work among 5,000 photographs where he had 310 select photographs are the pictures that matter. Not the ones that he edited out and would have discarded, and indeed, that a publisher would not use. Magazine, newspaper, textbook and so forth.

And one of the things Mrs. Kinne told you is that [441] she interviewed Mr. Gasperini as to his editing capacity and technique. You edit visual images, the language of visual images in the same way, I should say analogous to the way we

edit words. That you take into account composition and subject matter and so forth and you pick that which is select. And those 310 select images are now lost and cannot realize their value over the next 94 years.

And that is why you use an industry standard. That is why it is an average. That is why it is not contrary to the suggestion of Mr. Montbach that this is a lottery. We have more respect for your intelligence than that. And that is certainly not as Mr. De Margitay said Mr. Gasperini exacting his pound of flesh. Who exacted the pound of flesh here? A photojournalist who makes very little money and travels the world documenting the history of our times or a multimillion dollar defendant corporation.

MR. MONTBACH: Objection.

THE COURT: Well, both parties are to be treated equally by the jurors and their status or wealth is of no moment.

MR. S. ABADY: So you can ignore and should ignore the claim that what Mr. Gasperini is doing here is somehow vindictive or that he is seeking to play a lottery. That is not true. And you are the arbiters of fact as to his personality. You saw this man testify. When you go in **[442]** and you deliberate you should certainly discuss among yourselves well does he seem like a guy who is just looking to use us for a lottery or did he seem like a sincere man, a sincere man who lost something of great personal and market value to him and all we're asking of you. just compensation. That's all we're asking of you.

You buy lottery tickets for the lottery. You spend the time and effort of presenting real issues to the jury to get justice. That's what we're here for. Not a lottery as the defendant said. Maybe that's their cynical attitude, but it's not ours. You heard from Mr. Gasperini and his mother. You have a family context to infer something about his character.

What do we hear from William Ruebler, an award-winning photographer who works with one of the media empires in this country, who employs a thousand photographers, he himself oversees the work of 16 award-winning photographers,

whose own photographs were published in USA Today and in various other magazines and books.

What did he tell you? He said that this man's work is first rate. It is first rate. For those of you who have some knowledge and understanding in evaluating photographic imagery, you'll have examples. Ask yourselves, could you take pictures like that? Your friends. Do they **[443]** have the equipment the experience, the training. Do they get into the situations where they could capture such photographs? And as Mr. Kuebler told you, that excellent photography, remember, could have a value, could have a value over the next 94 years.

Notice, when the defendant testified, Mr. Goodman testified, he testified that for the one-time reproduction use of a single image, the defendant, Guidance Associates, Center for Humanities, has paid between 2 and up to $700 per image.

That means any one of his pictures would only have to sell to an organization like theirs who clearly does business or had done business with Mr. Gasperini twice and yet have $1400 realized from that picture. If it sold three times it would be $2100 and you have evidence in the record of several of his pictures being used on repeated occasions, including his early pictures from 1986 that were published in several publications at the same time.

It all depends. The fact that there were other photographers who may have taken pictures of some events is meaningless. Mr. Gasperini doesn't own the copy rights to those events and we don't know if those photographers developed their film, put it in stock, whether it was accepted. We don't know anything about it.

What we do know is that the quality of his **[444]** photography has been admitted to by the defendant and has been affirmatively demonstrated to you by our expert witnesses, by Mr. Kuebler and by Mrs. Kinne.

What we also, another gentleman we heard from was not an expert witness, not someone who knew anything about Mr. Gasperini but a man who runs a major photo stock agency, Robert Zentmaier. And what did he explain to you.

He explained to you not as a partisan but as someone who was subpoenaed to this court, that everyone in the industry is aware of this standard. That not a single document goes out, excuse me, not a single photograph goes out of his agency without a document that tells major players in the business like the defendant in this case that if you lose it or damage it the average is $1500.

Why? Why do we set the average? Why did the Committee on Valuation back in 1969 bother to ask of people like the defendant and advertising companies and publishing companies and newspaper chains, information of a survey, put in a survey, a large survey as to uses and the lasting value of the photography in order to establish this? Why? Precisely because we will never know the value of these photographs to a certainty over the last 94 years. That's the reason you have a standard. That's what the defendant was fully aware of.

You have in evidence numerous specimen forms that [445] are used by all of these stock agencies. Mrs. Kinne told you every, when I put the question to her, does every single defendant who is a member of the Picture Agency Council of America have a delivery memo that's transmitted with photographs, she said yes. And I asked does everyone have the term minimum value of a lost or damaged slide of $1500. She said no.

Why? Because some were more. The standard goes back to 1969 and the potential uses for photography has expanded. We live in a visual world. Most of us get most of our information as much from pictures as we do from words. Most Americans I believe get more of their information from current events and news from television than they do from newspapers.

In the future, with the paperless world that we're coming into over the next 94 years, the information highway, these pictures will be worth more, not less. The ability to package and transmit photography will increase and not decrease. CD ROM is already old hat.

It is over the next 94 years of potential use that Mr. Gasperini has been deprived of the value of this property to

himself and to his estate. That's what's lost here. Not the fact that he's made a thousand or $1500 a year so far.

The defendant wants you to punish him because he [446] chose not to exploit his own property which he was holding to write a book until after that event because they lost it. They want you to say: Well, limit your consideration only to those factors that have happened so far in time.

I'm sure if Mr. Gasperini knew that the defendant was going to lose his property he would have been sure to post it with a stock agency before leaving it with them in order to have a greater track record.

But that's not the point as you heard from Mrs. Kinne and as you heard from Mr. De Margitay this morning. It's over the lifetime of the copyright that these photos have potential value.

Ladies and gentlemen, I ask you to take that critically into consideration as that is what this case is about.

Now, the evidence has a whole is something you must also consider. You heard Mr. Goodman's testimony, you saw how Mr. Goodman came into this court and wouldn't even give me the back pages, photocopy the back pages of documents in his company's records that had the industry standard on [illegible]. You can infer from that why that wasn't disclosed.

MR. MONTBACH: Objection, your Honor.

THE COURT: Sustained.

MR. S. ABADY: Mr. Gasperini traveled as you [447] heard—

THE COURT: Without cutting you off, how much longer will you be?

MR. S. ABADY: About five minutes.

THE COURT: Please try to conclude if you can.

MR. S. ABADY: I am, your Honor. In Honduras, Guatemala, Costa Rica, Nicaragua, in El Salvador, in all of the hot spots of the Central American region he captured images, everything from the grisly face of war to the bucolic face of peace.

He was among the first people, he and Mr. Nachtway, to see poor Indian refugees repatriated back to their homes in the villages along the Atlantic coast.

At any time in the future, events could happen that could make those scenes invaluable. Pictures have all kinds of unanticipated value. Do you think the man that took the Rodney King video had any idea of its potential value or Abraham Zapruder when he took a picture of John Kennedy in a motorcade through Dallas.

Pictures can have all kinds of value, not simply as current events as Ms. Kinne explained to you, but as history of the recent past and distant past. Remember the example you heard from Mr. Zentmaier, a subpoenaed witness, that on D-Day all of a sudden 50-year old photos that have never sold before are selling like hot cakes.

[448] In conclusion, ladies and gentlemen, I ask you to think about Bill Gasperini, think about the nature and the quality of the evidence that you heard. Think about what it means to him and what it could mean to him if he still had, over the course of his lifetime and 50 years beyond, all of his life's work for seven years. And I believe if you look at the evidence in this case, the evidence that we presented, I believe that you will find the defendant at a minimum, at a minimum, must pay the industry standard which it used in dealing with all, many of its other customers or dealers, stock agencies and so forth.

In 1977, in 1977 generic pictures of a lunch room which was lost by the defendant caused the defendant to pay the company Photo Researcher—

MR. MONTBACH: No evidence of this.

THE COURT: No evidence as to what the pictures were that were lost, whether they were a lunch room or whatever.

MR. S. ABADY: I believe it's on the document in evidence.

THE COURT: The jurors' recollection will control.

MR. S. ABADY: The jurors will have the evidence.

THE COURT: They will indeed.

MR. S. ABADY: They paid them $750. Do you think **[449]** Mr. Gasperini's war photographs are worth the same as generic pictures of ordinary scenes that could be recreated. That's what the defendant paid in 1977. This is 1994.

I repeat Mr. Montbach. You use your common sense and ask yourself if the defendant paid $750 for Fifth Avenue street scenes, which is also in the exhibit, for photography that it lost in 1977, what should it be paying in 1994 for the kind of photographs that Mr. Gasperini took in Central America, the quality of which you see demonstrated in Exhibit 18.

So in the end, ladies and gentlemen, I conclude as I said before, if you look at the evidence as a whole, I believe you will find the evidence as a whole that we presented, who Mr. Gasperini is and the type of work that he generated, that at a minimum, he, like any other photojournalist, is entitled to a minimum of the industry standard.

I thank you for your patience.

THE COURT: Thank you, sir. As I explained earlier, members of the jury, Ms. Bravato will now project for you this Exhibit 10 which has to be done in open court because that's the only place we can present it, and you should watch it and give it consideration as evidence in the case the same as any other exhibit or testimony.

Everyone is going to sit here quietlyly while **[450]** that's done. No one is to say anything. As soon as she's finished playing all three of the cassettes, the clerk will excuse you for lunch and as soon as I get back from Foley Square, I think about 2:30, we'll resume and at that time I'll give you my instructions as to the law.

Please keep an open mind until you've heard the court's instructions as to the law. Thank you, very much. Thank you, counsel.

MR. S. ABADY: Thank you, judge.

(Tape played)

(Luncheon recess)

[451] AFTERNOON SESSION

3:16 p.m.

THE COURT: Good afternoon.

(Jury present)

THE CLERK: The court is about to instruct the jury. Any spectator desiring to leave must do so quietly.

CHARGE OF THE COURT

THE COURT: Good afternoon, members of the jury. I wish to begin by saying that I appreciate the fact that you've all given very careful attention to the evidence during this trial and I'm sure you'll approach your deliberations with that same fine spirit you've so far displayed and that you'll act with fairness and impartiality and reach a just verdict. In doing so you're not to be affected by sympathy for any of the parties or by any concern over what the reaction of the parties or the lawyers or anyone else will be, or whether it will please or displease anybody, or be popular or not. And you cannot give consideration to anything outside of the evidence which has been presented to you here in this courtroom and the applicable law.

As I told you when you were selected as jurors, in our court system the function of the trial judge and the function of the jury are different. Your purpose here is to decide and pass upon the disputed issues of fact and you're [452] the sole and exclusive judges of the facts. That's so important you may hear me say it more than once.

You should determine the facts from what you consider to be the believable or credible evidence in the trial. You'll also decide the weight and significance of the evidence, both the testimony and the exhibits, and you'll evaluate the truthfulness, credibility of the witnesses and you'll draw the common sense conclusions and reasonable inferences from the evidence that you think proper after discussing this case with each other.

And after you've resolved any conflicts as there may be in the evidence, you will have determined what the facts are and that will automatically lead you to your verdict, when you apply those facts to the law which I will be explaining to you at this time. And it's your obligation to accept the court's instructions as to the law and apply them to the facts as you find them to be. And on that basis you'll be able to render your verdict.

The evidence consists of the sworn testimony of all the witnesses, no matter which side called them, and all the exhibits. You may consider the documents and the exhibits which have been received in evidence and any fact which may have been stipulated to in the course of the trial may also be considered by you as proof. The exhibits will be in the jury room with you and you can look them over and [453] discuss them with each other in the course of your deliberations.

Questions are not evidence. Questions are never evidence. The evidence is the answers. Arguments of attorneys are not evidence and any evidence as to which an objection was sustained by the court, or any answer or argument by an attorney which was ordered to be stricken out by the court, must be disregarded by you in its entirety, and where evidence was received for a limited purpose, you'll use it only for that purpose.

Please understand that I have no opinion or thoughts as to how the factual dispute in this case should be resolved. That's your issue, that's yours alone and I leave it entirely to you. My only function here is to see that the trial is conducted as fairly and quickly as possible, and to explain the law to you on objections.

But the verdict is yours and it's yours alone and please don't get any notion from anything I may have done or said that I may have some attitude or viewpoint about the case. I do not, it is not my job, it's for you to decide. And don't think that I have any viewpoint whatever.

Now, as you understand, members of the jury, it's a civil trial which is devoted only to the issue of the amount of damages. In a civil trial, the plaintiff has the [454] burden to

establish all disputed elements of his or her claim by a preponderance of the credible evidence.

When a party has the burden of proof on a particular issue in a civil case, the contention of that party must be established by a fair preponderance of the credible evidence. That means the testimony you find worthy of belief.

Preponderance means the greater part of it. It doesn't mere the greater number of witnesses nor how much time either side employed during the trial. The phrase refers to the quality of the evidence, its weight or significance and the effect it will have on your minds.

You will decide disputed issues of fact from all the evidence that's before you. In order for a party to satisfy his burden of proof, the evidence that supports the claim on the issue must appeal to you as more likely or more nearly representing what took place.

On the other hand, if it does not or if the evidence is evenly balanced, then there's a failure of proof and you have to resolve the issue against the party that has the burden.

I know some of you may have been in criminal trials as jurors or you may have seen television shows or stage plays or anything like that that has to do with crime and you've heard the expression "proof beyond a reasonable **[455]** doubt." Members of the jury, that standard does not apply in a civil trial. That's the standard of proof which society requires before someone can lose his or her liberty and be convicted of a crime and that's a different standard than the standard applicable in a civil lawsuit such as in this case.

In this type of a case, a civil case, proof must appear to your satisfaction by a preponderance of the credible evidence. So please put out of your mind any discussion you may have heard about proof beyond a reasonable doubt, because that's for criminal trials only.

Now, in this case the defendant is a corporation. The mere fact that one of the parties is a corporation does not mean it is entitled to any lesser or greater consideration by you. All parties are equal before the law in this court, and corporations big or small are entitled to the same fair just consideration

that you would give any individual party and no more and no less.

You're instructed that a corporation acts through its agents or employees or officers working within the scope of their employment. And any fact admitted by a corporate agent or officer or director or employee concerning a fact matter within his or her work, scope of work or knowledge resulting from working for the corporation is an admission of fact on the part of the corporation and you can treat it **[456]** so.

You jurors, as I said earlier, are the sole judges of the truthfulness or credibility of any witness and you and you alone decide the weight the testimony of any witness deserves, and you should consider all the testimony before you that bears on this issue, and you should scrutinize the testimony given and decide whether it's worthy of belief.

You use your common sense as jurors in doing this. You may consider the witness' intelligence; the motive of the witness; the demeanor of the witness, that is to say the manner in which he or she gives testimony on the stand; you may consider the opportunity the witness had to observe the facts and remember them; you may consider the plausibility or probability or improbability of the testimony in light of all the other facts in the you can also consider any relationship which the witness may have to either side in the case; or the manner in which a witness may be affected by or interested in the outcome of the trial; or any bias or favor that any witness may have toward either side in the trial.

There's no magic formula to do this. In your everyday lives each of you determines the reliability of statements made to you by other people. The same tests you use in your everyday dealings and your common sense are to **[457]** be relied upon in your jury deliberations.

Now, there have been occasions in the trial when witnesses, having some specialized training or experience in a particular field, have been permitted to give testimony in which they express opinions or conclusions as to practices or matters or knowledge or information in the field in which they have a specialized training or experience.

This type of testimony, so-called opinion evidence, should be given such weight as you think it deserves. If you decide that the opinion of a specialized witness is not based on sufficient experience or knowledge, or if you conclude that the reasons given in support of the opinion are not sound, or if you feel that the opinion is outweighed by other evidence, or simply if you think it's wrong, you may disregard that testimony entirely.

You, because you're the sole judges of the facts, have the right to accept or reject any part of any opinion evidence from persons having any specialized training or knowledge or experience as you think proper, just as you do with respect to any other testimony in the trial.

Now, in this case, as I said earlier, you'll decide only the question of damages. That is to say, you will determine what single amount of money in dollars, lump sum in dollars, will fairly and justly compensate the plaintiff for the loss of his property. The question of **[458]** liability is not at issue. 310 slides have been lost. All evidence concerning the slides will be received and considered by you only on the question of damages.

As you understand, the plaintiff in this case is Mr. William Gasperini, the defendant in this case is the Center for Humanities Inc. doing business as Guidance Associates, and there's no dispute that 310 slides have been lost.

Now, the plaintiff has the burden of proving the amount of his damages within reasonable certainty by a preponderance of the credible evidence.

The purpose of damages is to award as far as possible just and fair compensation for the loss. You must award the plaintiff sufficient damages in your judgment, after deliberation and based on your consideration of all the evidence in the trial, which will compensate him for his loss. This is what's called compensatory damages. Compensatory damages seek to compensate or make the plaintiff whole, that is to compensate him for his loss to the extent that money can do so.

Damages are not being awarded to punish anybody but only for fair compensation.

Computing damages may be difficult but you must not let that difficulty lead you to engage in arbitrary decision-making or guesswork. On the other hand, the law **[459]** does not require a plaintiff to prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You can use your own common sense and you're not bound to accept or reject any particular contention or any particular testimony, but you look at the entire picture and everything developed at the trial. You're to use your sound discretion in fixing an award of damages, drawing reasonable inferences, where you deem appropriate, from the facts and the circumstances in evidence.

Damages must not be based on speculation or sympathy, but on the evidence and only on the evidence.

Now, in making this determination, you may take into consideration the fair market value of the property lost at the time and place of the loss—that's the basic measure of damages in this case—and you determine that by understanding that the fair market value is that price at which a fully informed and willing owner, under no compulsion to sell, would have voluntarily sold; and a fully informed buyer, under no compulsion to buy, would have voluntarily bought and paid for all the rights of the owner in the 310 slides which were lost.

Now, in reaching this issue of value, you'll use your common sense, and, as I said earlier, you'll rely on all facts known to you in the case and all the testimony **[460]** bearing on value. You will consider the ability and experience and knowledge of the photographer; the reputation of the photographer or photojournalist, or whatever it is that you wish to refer to him as; you'll consider the prior licensing fees collected and the prior experience of the plaintiff in connection with his slides; you may consider the extent and nature of his efforts to exploit the economic value of these transparancies; you can consider the content and subject matter of the lost slides; you may consider potential competition or alternative sources of similar or substitute photography; you can consider the nature of the demand in the market for the use of pictures of this particular type and content.

If you find that it would take a long period of time to sell or otherwise dispose of the transparancies between a willing seller and a willing buyer, you may discount for a reasonable length of time you think it might take. You may also reduce the value for any considerations which you may think proper involving the cost of merchandising, either by stock agency or by any other ordinary business means.

You may consider the potential use of the slides for the purposes of writing a book, if you find, based on the evidence, that the plaintiff actually did intend to write a book or books and would have used the pictures for [461] such a book and that it would be economically profitable to do so.

You're considering the entire bundle of rights involved in the photographs, not merely a single use licensing fee, and therefore you should fix the value of the slides or transparancies over the life of the copyright. And you must understand also that you'll determine this fairly and reasonably from all the evidence in the case, and an amount claimed in the complaint has no evidentiary value whatsoever, and the argument of the attorneys as to value are only useful to you to the extent that you, after deliberating the case, agree with them. If you think there's been exaggeration or undue minimization of the value by any witness you can take that into consideration also.

Now, you have heard some discussion or argument on this issue of whether there is an industry standard. You may consider the existence of industry practices for whatever value it has or whatever assistance it gives you in dealing with this issue of the lost slides. However, any such evidence is only evidence and it's not conclusive and not binding.

And you're instructed that there is no evidence in this trial that there was any memorandum receipt incorporating the specific amount as set forth in 13D, Exhibit 13, any of the subexhibits of 13 which have been [462] received in evidence, and there's no evidence that these parties agreed on the industry standard or that these parties used it or indeed that the standard is always enforced in the everyday business world.

But as I said earlier, the evidence which you've heard in some detail about the existence of this standard or the practice may be considered by you for such evidentiary value as you think it has, together with all the other evidence in the case, in bearing upon the value of the ownership, total ownership of the missing or lost slides.

Now, you will reach your verdict by deliberation. And jury deliberation requires fair and impartial consideration by each juror. Each juror is entitled to his or her own opinion. And you're required to exchange your opinions or views with one another. That's jury deliberation. You give your own opinion and listen to the opinions and judgment of the other jurors just as you would discuss an important matter in polite conversation.

And in that way, if you keep at it, you should be able to come to an agreement with one another. Talk about the case openly and reason it out and discuss the evidence fairly and politely and take your time and say your own views and listen with an open mind to what the others have to say.

But the verdict can only be reached by [463] deliberation and it represents the decision of all jurors and there's no shortcut to reach a verdict in a case of this sort. There's no way of getting unanimity by splitting the differences or anything like that. You just talk about it until you agree together on a single figure of damages and dollars. And you're not to give up your own view simply because you're outnumbered or outweighed or outtalked by the other jurors.

But by the same token you shouldn't be obstinate. If you find that the other jurors' logic or argument appeals to you as being more correct than your own, in other words, if they really convince you, then you should not hesitate to change your mind and agree with the others if you do in fact agree.

As I said earlier, the verdict represents the decision of each of you and it must be unanimous and you have to exercise your conscientious efforts to agree together and reach an unanimous decision without giving up your own conscientious views.

You will have the exhibits in the jury room and if there is anything that I've said in my legal instructions that's unclear to you or you don't remember it or you don't understand something that I've said, you may want me to explain it better or repeat it and you can send out a note with such a request.

[464] If you really want to have testimony read back to you, we'll try to do that also. If you do, you'll be brought out in open court and the court reporter will read to you and that's a lengthy process. So please send out as clear a note as possible telling what you want to hear and please don't request a reading of testimony until you've had a chance to talk with one another because obviously the memory of all six people is better than the memory of any one juror. And if you talk about it together and discuss it, it may refresh your recollection and you may not need to have anything read to you.

But as I said, I'm perfectly willing to do it if the jurors think it's necessary and all you have to do is send out a note telling me what you want.

The jury instructions which I have been going through at this time have been taped on a tape recorder. The tape recorder and the machine to play it will be furnished to you in the jury room for your use if you wish to listen to the court's instructions again in whole or in part.

The fact that it's being given to you doesn't mean you have to use it. It is your decision and yours alone whether playing all or part of the tape recording will be helpful to you. If the tape is unclear or garbled for any reason, we do have the court reporter here who can read **[465]** back the court's instructions if need be or I will attempt to repeat it from my notes in whole or in part.

Now, when you'll knock on the door and tell the clerk that the jury has reached a verdict. Then you'll be brought out into open court and seated in the jury box and the foreperson of the jury, which is juror number 1 on my right, will be asked whether the jury has reached a verdict. And if the foreperson answers yes the jury has reached a verdict, the clerk will then ask you to state your verdict and that will be stated by saying:

We find for the plaintiff in the total amount of X dollars, stating the dollar amount upon which the jury has agreed. And after the foreperson has stated the verdict, each of the rest of you will be asked, one-by-one, whether the verdict as reported is your verdict, in order to assure that it's unanimous.

Now, it may be that there's something additional which the attorneys will want me to say to you so I'm going to ask you to stay right where you are and don't talk with each other and continue to keep an open mind so I can speak with the attorneys and see if there's some additional point which perhaps I should have raised with you or should add to my instructions. So please just stay right where you are.

(At the side bar)

THE COURT: Recognizing that you're entitled to **[466]** preserve exceptions for anything that you had raised with me in the charge conference which was not covered in substance, or anything that you requested in writing which I did not do, is there anything further or additional?

MR. S. ABADY: Your Honor, we would request for the record that plaintiff's proposed instruction number 8 as to similar acts directed to defendant's knowledge as having previously taken delivery—

THE COURT: Declined and you have an exception.

MR. S. ABADY: Plaintiff's request 17 with respect to impeachment by prior inconsistent statement.

THE COURT: Declined and you have your exception. In this trial there really were no prior inconsistent statements that are relevant to any issue of damages.

MR. S. ABADY: There were times in which the first witness, several times when she was impeached by prior inconsistent statements.

THE COURT: Not impeached. I decline to say anything further on credibility than in the ordinary boilerplate.

MR. S. ABADY: I mean no criticism of your Honor here.

THE COURT: I understand.

MR. S. ABADY: I requested, your Honor, that you give an instruction as to intrinsic value.

[467] THE COURT: Declined. I ruled on that earlier. This is a dealing between business people engaged in photojournalism.

MR. S. ABADY: I have nothing further, Judge.

MR. MONTBACH: I have nothing, your Honor.

THE COURT: Thank you.

MR. S. ABADY: I'm sorry, Judge.

MR. J. ABADY: I was going to make a request that you instruct that copyright as to the lifetime of the photographer—

THE COURT: That's already been told them. They know his age. I decline to elaborate further on that.

(In open court)

THE COURT: Members of the jury I have nothing more to add at this time except to say one thing: It is entirely a matter for your own scheduling. There's no requirement that you stay late. You will not be sequestered. If you wish to break for the day, just send out a letter saying, send out a little note saying that the jury has agreed to recess for the day and you'll come back tomorrow morning, probably at 9:30 or whatever hour within reason that you want to choose and resume your deliberations in the morning. So don't feel pressed for time or crowded in any way. You can stay as late as you reasonably want to and you can go home when you're ready to go home.

[468] Please go in the jury room and begin your deliberations.

(Deliberations begin; 3:44 p.m.)

THE COURT: The record should show that the attorneys have agreed to all exhibits.

MR. MONTBACH: Yes.

MR. S. ABADY: That's right, your Honor.

THE COURT: And you're seeing now what the clerk is taking in and also a view box is being taken in. Thank you, very much.

(4:09; jury not present)

THE COURT: The court has received the note from the jury and the note has been exhibited to counsel. It says "We're wondering why a delivery memo was never signed between Mr. Gasperini and Mr. Goodman."

The court will now hear counsel. My proposal is to tell them that that's not a question which the court can answer and that's not a question which is a matter of their concern. They have to take the facts as they find them and their function is to fix the market value of the lost slides.

MR. S. ABADY: Your Honor, I would propose that you remind the jury that there were two points of testimony on precisely that issue. Mr. Gasperini himself testified that he delivered personally the slides and worked with them [469] at the premises and then was called away to the Persian Gulf. Susan Green confirmed that. And Jane Kinne testified that there would be no purpose for him to have a delivery memo in light of the fact that it would be in her words like writing—

THE COURT: Who were these witnesses?

MR. S. ABADY: The plaintiff so testified, Susan Green, who was called by the plaintiff, the defendant's former employee gave verisimilitude to the plaintiff's testimony and Jane Kinne testified when I propounded the question to her that it made sense that Mr. Gasperini would not have a delivery memo as it would be like writing a memo to yourself since he wasn't sending them by courier or Federal Express to the defendant but he carried them with him, carried the slides with him to the defendant's premises and had no intention of leaving them there except that he was called away to the Persian Gulf.

MR. MONTBACH: I don't agree with that characterization; You've already made a charge to the jury that there is no delivery memo involved in this transaction and I think there's no need to embellish upon that.

MR. S. ABADY: But there's testimony in the record that the jury can hear.

THE COURT: I'll try to cover it. After I cover it, if you want to be heard at the side bar you can ask for [470] something further. Please bring in the jurors.

(Jury present)

THE COURT: Members of the jury, I have your note. It says "We're wondering why a delivery memo was never signed between Mr. Gasperini and Mr. Goodman."

That is really a question which asks for an issue of fact, a fact question rather than a law question. Fact questions are solely for the jury from the evidence. The court answers only questions of law, questions of procedure.

I would like to say to you that there was some testimony from at least three of the witnesses bearing on this topic, the bottom line, however, is that—and if you wanted any of that testimony read back, both the-plaintiff and the witness Green and the witness Kinne mentioned this in passing in their testimony, and if you'll talk to each other you'll probably remember what they said—but the bottom line was there was no delivery memo signed.

And you have to take the facts of the case as you find them to be, and it's for you to find the market value of the missing slides in dollars based on all the testimony in the case, determining why may not directly bear on the issue of market value. Because the fact is there is no delivery memo signed as you seem to recognize in your note.

I hope I've answered your question directly and I'm going to ask you to stay where you are for a moment [471] while I see if the attorneys have any additional request as to how I should answer it.

(At the side bar)

MR. S. ABADY: That was fine, Judge.

MR. MONTBACH: Your Honor, they're trying to create a contract where there is no contract. I think it has to be pointed out to the jury that there is no contract.

THE COURT: I decline to do so beyond what I've already done. I have told them there is none. They know there is none.

(In open court)

THE COURT: Please resume your deliberations.

(Deliberations resume; 4:15 p.m.)

(Jury present; 4:39 p.m.)

THE CLERK: Will the foreperson please stand and respond as I inquire. Has the jury agreed upon a verdict?

THE FOREPERSON: Yes, we have.

THE CLERK: How do you find?

THE FOREPERSON: We award the plaintiff 450,000, which is 1500 each, for 300 slides.

THE COURT: You may be seated.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. You say you find a verdict in favor of the plaintiff awarding him $450,000. Is that your verdict?

[472] (Jury polled; all answered affirmatively)

THE COURT: Thank you, very much. The court will order that the jury's verdict be recorded and that the clerk of the court shall enter judgment thereon together with prejudgment interest of 9 percent per annum from August 30, 1991, and at this point I want to thank the jurors for their service here in the court during June and we appreciate very much your efforts and the conscientious attendance.

You're now excused with the thanks of the court. You're free to discuss the case if you want to. You're certainly under

no obligation to discuss it with anybody, including myself. I don't plan to ask.

You'll feel better, if anybody should ask you about the case, tell them go away, don't bother me because it's past and you've done your obligations and there's no need to look back and not any need to discuss it with anybody unless you're absolutely sure you want to do so.

Please have a pleasant weekend and holiday and you're excused with the thanks of the court. You may withdraw from the courtroom at this time.

(Jury excused)

THE COURT: Both sides will keep their own exhibits and you may pick them up from the clerk as soon as she has gathered them together. Thank you all for your efforts. The court will be in recess.

[473] MR. S. ABADY: Will the judgment be issued this afternoon or tomorrow?

THE COURT: It will issue today but there's a regular ten day stay in the statute.

MR. S. ABADY: That I'm aware of.

THE COURT: And I'm sure that it's a case which will merit the attention of the Court of Appeals for the Second Circuit.

MR. MONTBACH: Yes, your Honor.

THE COURT: The court will be in recess.

MR. S. ABADY: Thank you again, Judge.

(Record closed)

[474] WITNESS INDEX

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WILLIAM GASPERINI	210	271	309	
WILLIAM KUEBLER	311	316	318	
JANE KINNE	319	353		
GIDEON DE MARGITAY	374	393	409	411

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIVIL 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC,
d/b/a GUIDANCE ASSOCIATES

Defendant.

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant, United States District Judge with a jury on June 6, 1994, and at the conclusion of the trial, the jury having returned a verdict in favor of the plaintiff in the amount of $450,000.00 and the court thereafter directed the clerk to enter judgment in favor of the plaintiff with pre-judgment interest at the rate of 9% per annum from August 30, 1991, it is,

ORDERED, ADJUDGED and DECREED: That the plaintiff William Gasperini have judgment in the sum of $564,750.00, as against the defendant.

DATED: White Plains, N.Y.
June 30, 1994

APPROVED:

/s/ CHARLES BRIEANT
U.S.D.J.

/s/ JAMES M. PARKINSON
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Francis A. Montbach, sworn to the 11th day of July, 1994, the exhibits annexed thereto and the accompanying Memorandum of Law, defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, will move this Court, at the Courthouse, 101 East Post Road, White Plains, New York, Courtroom No. 31 for an Order pursuant to Rule 59 of the Federal Rules of Civil Procedure granting defendant a new trial, on the issue of damages, in the captioned matter, said motion to be heard on the 29th day of July, 1994 at 9:00 a.m. in the forenoon of that day.

In accordance with FRCP Rule 59(c), opposing affidavits, if any, must be served upon movant within ten (10) days of service hereof.

Dated: New York, New York.
July 11, 1994.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a
Guidance Associates

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

AFFIDAVIT

FRANCIS A. MONTBACH, being sworn, deposes and says:

1. He is an attorney duly admitted to practice before this Court and is a member of the law firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for the defendant The Center for Humanities, Inc., d/b/a Guidance Associates herein. Having handled this matter since its inception, deponent is fully familiar with all the facts and circumstances had herein.

2. Deponent submits this affidavit in support of defendant's motion to set aside the verdict of the jury rendered herein on June 30, 1994 and the judgment entered thereon on June 30, 1994 and to grant a new trial on the following grounds:

a. The verdict is contrary to the law.

b. The verdict is contrary to the evidence.

c. The evidence in this case is totally insufficient to show damages, as awarded, in the amount of $450,000.00, and there is no evidence to sustain the verdict of the jury herein.

d. The evidence, construed in its most favorable light on behalf of the plaintiff, was insufficient to support the verdict of $450,000.00 rendered for the plaintiff against the defendant herein.

e. The verdict of the jury herein is excessive and appears to have been given under the influence of passion and prejudice.

f. The Court erred in denying defendant's Motion *In Limine* and erred in permitting plaintiff, on direct examination of the plaintiff's witnesses and cross-examination of defendant's witnesses, to introduce testimonial and documentary evidence concerning the existence and amount of an industry standard" in the amount of $1,500.00 pursuant to which lost and/or damaged slides should be valued.

g. The Court erred by refusing to allow defense counsel to cross-examine plaintiff concerning the uniqueness of the photographs taken by plaintiff in Central America, which were the subject of plaintiff's claim.

h. The Court erred in refusing to give defendant's Requested Special Jury Instruction No. 1.

i. The Court erred in denying defendant's oral motion to quash those portions of plaintiff's trial Subpeonae Duces Tecum which compelled production of "delivery memos" and/or "delivery receipts" received by defendant from photo stock agencies and which contained language concerning the "industry standard" for valuation of lost and/or damaged slide transparencies. The subpoenaed documents were irrelevant and should not have been admitted into evidence.

3. On June 30, 1994, at the conclusion of approximately two full days of trial the jury awarded plaintiff damages in the amount of $450,000.00. In rendering its verdict, the jury specifically stated that it arrived at its award by multiplying three hundred lost slides by one thousand five hundred dollars per slide. At the outset of this trial, defendant brought on a Motion *In Limine*, seeking to preclude the introduction of any evidence concerning the existence of a claimed minimum industry standard of $1,500.00 per slide for valuing lost or damaged slide transparencies. In addition, at the outset, defendant brought on an oral motion to quash those portions of the trial subpoenae served on employees of defendant which called for the production of delivery memos or receipts received by defendant from photo stock agencies which were not involved in this action. Both of these motions were denied by the Court (See Exhibit "A" annexed hereto with regard to denial of the Motion in Limine) and, with regard to the Motion *In Limine*, the Court expressed the opinion, as it did at other times during the trial, that common sense dictated that no juror would believe that each and every missing slide had a value of $1,500.00

4. The denial of the Motion *In Limine*, over the objection of counsel, permitted plaintiff to repeatedly introduce highly prejudicial testamentary and demonstrative evidence of not only the existence of an "industry standard" of $1,500.00 per lost or damaged slide, but of defendant's "knowledge" of that standard and acquiescence in it (allegedly by failure to refuse to accept photographs from stock agencies which delivered photos accompanied by delivery memos containing language referencing the $1,500.00 "industry standard"). Plaintiff introduced testimony, over defendant's objection, With regard to the $1,500.00 "industry standard" during plaintiff's direct examination of defendant's President, Mr. William Goodman, and during plaintiff's direct examination of the three "expert" witnesses who gave testimony on plaintiff's behalf, Robert Zentmaier, William Kuebler and Ms. Jane Kinne.[1] In addition,

[1] It should be noted that both Mr. Zentmaier and Mr. Kuebler were presented as fact/expert witnesses and allowed to testify over the objection of defendant, despite the fact that Mr. Kuebler was originally listed only as a fact witness and was changed, on the morning of June 27, 1994, to an expert witness, while Mr. Zentmaier who was never listed as a fact or expert witness, was not named as a witness, fact or expert, until immediately prior to opening statements. Defendant neither received a written report of their proposed testimony nor were permitted to depose them prior to trial.

plaintiff introduced and the Court admitted as evidence, over defendant's objection, numerous documents which contained verbiage referencing the claimed "industry standard". Specifically, the Court referred to plaintiff's Exhibits 12A, E, F, G; 13 A through H and 30, stock agency delivery memos, all of which were introduced to emphasize the claimed existence of an "industry standard" of $1,500.00 per lost or damaged slide and defendant's "awareness" of that "standard".

5. With regard to plaintiff's Exhibit 30, defendant's copies of delivery memos from stock agencies, plaintiff's counsel repeatedly highlighted the inadvertent failure to provide copies of the reverse side of the documents and implied, to the jury, that defendant was trying to "hide" its knowledge of the "industry standard". Such was not the case, however, it is evident from the jury verdict, and the manner in which the jury calculated damages that they not only believed the repeated assertion that a $1,500.00 "industry standard" for valuing lost slides existed, but believed that defendant's acceptance of delivery memos from stock agencies which contained the "industry standard" valuation language somehow bound defendant to pay that amount to plaintiff, even though there was no delivery memo covering the missing 300 slides or mention of the "industry standard" during any discussions between Mr. Gasperini and defendant. The admission of the delivery memos was highly prejudicial. Although they were purportedly admitted only for a limited purpose, their prejudicial effect greatly outweighed any probative value since there was no delivery memo between plaintiff and defendant in this case.

6. Had defendant's Motion *In Limine* been granted, the jury would not have been prejudiced by the continual repetition of

the $1,500.00 "industry standard" mantra and would have been able to render an award based upon the recognized criteria set forth in defendant's Requested Special Jury Instruction No. 1 (a copy of which is annexed hereto as Exhibit "B"), which criteria were discussed in defendant's Trial Memorandum of Law.

There was no evidence submitted by plaintiff that any of the lost photographs were unique. In fact, the Court, in precluding deponent from questioning plaintiff on the topic of the existence of other photographers at the times the lost photos were taken, stated that it was common knowledge that there were many other photographers present in Central America at the time that plaintiff was taking his photographs. Exhibits submitted to the jury clearly established that Mr. Gasperini's photographs, while being of good quality and of interesting subjects, were not unique. In addition, defendant's expert, Mr. Gedeon de Margitay, specifically stated that over 80% of the missing 300 slides had, at best, minimal market value, due, in part, to the fact that similar pictures were readily available from other sources, such as The Associated Press. The jury having had the $1,500 "industry standard" drummed into their heads, was severely prejudiced by evidence which should have been excluded.

8. Likewise, the prejudicial effect of the "industry standard" testimony allowed the jury to totally disregard the primary criteria for establishing the value of lost slides, especially the earning power of the photographer. The only nonspeculative evidence before the jury concerning Mr. Gasperini's earning power demonstrated that he had earned less than an average of $1,000.00 per year over the last decade from the use from the of the photographs which he took while in Central America, yet the jury awarded him almost 50 times his total prior demonstrated earnings as a result of the loss of six percent of the photographs he took. While Mr. Gasperini contended that the lost 300 slides were his best, he did not demonstrate that those slides had any significant earning power or potential, or for that matter that he had any proven earning power as a photographer.

9. Similarly missing was any evidence that the so-called "industry standard" of paying $1,500.00 per slide for lost or damaged slides was ever followed by the industry. None of the experts presented by the plaintiff ever testified to that effect. In fact, plaintiff's prime experts, Ms. Jane Kinne and Mr. Robert Zentmaier confirmed the fact that in the one instance where defendant had lost slides belonging to Photo Researchers, Inc., a payment of less than 50% of the so-called "industry standard" was made, despite the fact that the "standard" was specifically set forth on the delivery memo pursuant to which the lost slides had been given to defendant. The non-existence of a custom and practice in the industry to pay $1,500.00 per lost or damaged slide was confirmed by Mr. de Margitay. Plaintiff did not submit one scintilla of evidence that of any member of the "industry", including defendant, ever having paid $1,500.00 per slide for a lost or damaged slide, despite the fact that both Mr. Zentmaier and Ms. Kinne had worked for stock agencies virtually all of their lives. Contrary to the evidence that no industry standard exists, factually or legally[2], the jury, undoubtedly swayed by the constant reference to a $1,500.00 "industry standard", nevertheless applied the nonexistent "industry standard" to plaintiff's loss. They did not find that the misplaced slides had a "value" of $450,000.00, rather, as they stated, they reached the $450,000.00 damage figure by multiplying the 300 misplaced slides by the $1,500.00 "industry standard".

10. Had defendant's Motion *In Limine* been granted, the jury would not have been constantly exposed to a claimed "standard" which was never factually or legally established by the plaintiff. It would have had to make its award based upon testimony addressed to the true issue which should have been decided; the amount of damages recoverable applying the criteria established by the courts, to wit: (1) the uniqueness of the subject matter; (2) the established prestige and earning level of the photographer; (3) the frequency of accep-

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[2] The Court is referred to the decisional law cited in defendant's Trial Memorandum of Law and Memorandum of Law in Support of the denied *Motion in Limine*.

tance by users; and (4) established sales and use prices. The testimony at trial which should have been, and obviously wasn't, considered by the jury clearly established that the photographs were not unique and were not in demand; Mr. Gasperini had a very low earning level as a photographer and was not a known photojournalist—other than to his friends; and that the most Mr. Gasperini was ever paid for the use of his work was approximately $100.00, something which occurred only on rare occasions. Application of the accepted criteria, in the absence of any consideration of the non-existent "industry standard" should and would undoubted have resulted in an award of less than 10% of the $450,000.00 awarded. An award in the value range testified to by defendant's expert, between $15,000 and $20,000 would have amounted to approximately twice Mr. Gasperini's total earnings from his photographs during his lifetime. It must be conceded that the award of $450,000.00 has no evidentiary basis, is extremely excessive and can only have resulted from improper prejudice brought on by the improper admission of evidence of the existence and applicability of the non-existent "industry standard" for $1,500 per slide.

11. In light of the foregoing, it is wholly proper for this Court to exercise its considerable discretion and order a new trial of this action, in view of the fact that the jury's verdict was inconsistent with the weight of the credible evidence and resulted from the prejudicial effect of admission of testimony regarding a non-existent "industry standard", over the objection of defendant. To do otherwise would be a miscarriage of justice.

12. This motion is based upon the papers and proceedings in this action.

WHEREFORE, it is respectfully requested that an Order be entered, pursuant to Rule 59 of the Federal Rules of Civil Procedure, granting a new trial on the issue of damages in this action and for such other and further relief as to this Court shall seem just and proper.

/s/ FRANCIS A. MONTBACH
FRANCIS A. MONTBACH

Sworn to before me this
11th day of July, 1994.

/s/ SAMUEL O. OTCHERE
Notary Public

SAMUEL O. OTCHERE
Notary Public, State of New York
No. 01OT5012161
Qualified In Queens County
Certificate Filed in New York County
Commission Expires June 15, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MOTION IN LIMINE

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BIGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, White Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the prevailing decisional law establishing that no such "industry standard"

Motion Denied. See Transcript of Trial for oral decision

SO ORDERED

June 27, 1994

CHARLES L. BRIEANT
USDJ

DEFENDANT'S REQUESTED SPECIAL JURY INSTRUCTION NO. 1

DAMAGES

If you should find, from a preponderance of the evidence in this case, that the plaintiff is entitled to a verdict, the law provides that the plaintiff is to be fairly compensated for his damages, if any, which were proximately caused by the defendant's conduct. Your verdict must be to compensate the plaintiff, and not to punish the defendant. Any award of damages to the plaintiff must be based upon a reasonable certainty and not speculation.

In making this determination you are not to take into consideration any claim that there exists an industry standard pursuant to which a photographer is entitled to a set amount of money per slide for slides which are lost or damaged[1]. Rather, you are to determine the amount of compensation the plaintiff should receive in order to place him in the same position he would have been prior to the loss by taking into consideration the following criteria:[2]

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[1] *Gentien v. The Hearst Corp.*, NYLJ, March 5, 1993, Page 25, Col. 2 (App. Term, 1st Dept.).

[2] *Miller v. Newsweek*, 675 F. Supp. 872, 876 (D.Del. 1987); *Ratner v. GEO Magazine*, NYLJ, March 16, 1986, Page 39, Col. 2 (S.D.N.Y.)

1. *THE ESTABLISHED PRESTIGE AND EARNING LEVEL OF THE PLAINTIFF AS A PHOTOGRAPHER.*

   If you find that the plaintiff was not an established and/or known photographer or that he did not have a record of earnings from his photography, you should take this into consideration in your award.

2. *THE UNIQUENESS OF THE SUBJECT MATTER.*

   If you find that the subject matter of some or all of the lost slides were of unique subjects which are not available elsewhere, then this should be reflected in the amount of compensation you award. Should you determine that the subjects represented in the lost photographs were not unique and/or that other photographs of the same or similar subjects are available, then your award should reflect this fact.

3. *FREQUENCY OF ACCEPTANCE BY USERS.*

   You should take into consideration whether or not the plaintiff has proven that his photographic work is used with any frequency by users of photography. If his work is not in demand or if photographs of the subject contained in the lost slides are not in demand, then this factor should be part of your consideration.

4. *ESTABLISHED SALES AND USE PRICES.*

   You should take into consideration the amount of compensation the plaintiff has received in the past from the sale or use of his slides in determining any compensation he may be entitled to.

Once you have taken all of these criteria into consideration, with an emphasis on the first two, you should determine the

amount of money, if any, which should be awarded to the plaintiff to make him whole.

AUTHORITIES:

Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions, Civil*, Vol. 3, Section 86.07.

Given ___ Refused ___ Modified ___

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7204 [CLB]

WILLIAM GASPERINI,

Plaintiff,

- —v.—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

DECLARATION IN OPPOSITION TO DEFENDANT'S RULE 59 MOTION FOR A NEW TRIAL

Samuel A. Abady, a member in good standing of the bar of this Court, and Jonathan S. Abady, admitted to this Court *pro hac vice*, pursuant to 28 U.S.C. §1746, affirm as follows:

1. We are counsel to plaintiff William Gasperini in this property damage action involving the loss of 310 slide transparencies. We submit this affirmation in opposition to the motion by defendant for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. As set forth below, and as demonstrated in the accompanying memorandum of law, defendant's motion is baseless in all respects, and should be denied.

PRELIMINARY STATEMENT

2. Each argument in defendant's Rule 59 motion is nothing more than a rehash of arguments raised both before and during trial. The Court previously ruled upon and denied each and every argument in defendant's Rule 59 motion. Hence, defendant has improperly sought to reargue issues previously determined under the guise of a motion for a new trial.

3. The Court's rulings appear throughout the trial transcript, and are referenced below.[1]

GROUNDS FOR DEFENDANT'S RULE 59 MOTION

4. Defendant's motion is purportedly based on nine different grounds. However, upon examination, it is clear defendant has advanced but five arguments: (i) the verdict is contrary to law; (ii) the verdict is contrary to the evidence; (iii) the verdict was the result of passion and prejudice; (iv) the Court improperly limited defense counsel's cross-examination of Mr. Gasperini regarding the presence of other photographers when Mr. Gasperini was taking certain photographs in Central America; and (v) the Court improperly denied the motion in limine to prohibit plaintiff's expert from testifying about the minimum industry standard for valuation

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[1] Upon receipt of defendant's Rule 59 motion, counsel herein immediately contacted the Southern District Reporters to obtain the trial transcript on a "rush" basis. Stenographers from two branches of that office recorded the trial, *viz.*, those from the White Plains branch on June 6, 1994 (jury selection) and June 27, 1994 (the first trial day); and Aldi Goren of the Manhattan branch on June 29 and 30, 1994 (the second and third trial days.) Pages 150 through 475 were made available (excluding the jury charge at pp 451 to 467.) However, Ms. Gorayeb of the White Plains office advised that the first trial day could not be produced until two to three weeks after the return date of this motion.

Accordingly, defendant's counsel agreed to stipulate to extend plaintiff's time to reply in order for both sides and the Court to have the full trial transcript available. A stipulation was prepared and delivered by hand, at defense counsel's request. Two business days before plaintiff's answering papers were due, however, defendant's counsel suddenly refused to sign the stipulation. Hence, references to events at trial prior to June 29, 1994, are from memory.

of original slide transparencies, or in the alternative, improperly permitted plaintiff to introduce evidence about the industry standard.[2]

5. Each of these five points is addressed separately below.

THE VERDICT WAS NOT CONTRARY TO LAW

A. The Causes of Action Were Proven Under New York Law

6. Plaintiff submitted an extensive pre-trial brief demonstrating that each cause of action set forth in the complaint was sound, and that defendant's affirmative defenses were wanting. Defendant's contention to the contrary is meritless. Plaintiff will not burden the record with recapitulation of the pre-trial brief, but respectfully refers the Court to the arguments set forth therein.

7. Defendant conceded that: (i) it received 310 of Mr. Gasperini's slides for reproduction in the video series it produced, "Conflict in Central America," and paid Mr. Gasperini royalties for use of his slides;[3] (ii) the slides were not purchased, but remained Mr. Gasperini's property; (iii) it failed to return the slides to him, and in fact, lost the slides.[4]

8. The pre-trial brief amply demonstrated that, as a matter of New York law, these facts conclusively prove the causes of action stated, *viz.*: (i) mutual bailment for value; (ii) negligence; (iii) breach of contract; and (iv) conversion.

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[2] Defendant's grounds set forth in items (b), (c) and (d) of Mr. Montbach's affidavit at page 2 are restatements of the same argument, i.e. that the verdict was not supported by the evidence; items (f), (h) and (i) at page 3 are restatements of the same argument, i.e. that evidence about the industry standard should have been excluded. Hence there are but five points at issue.

[3] *See*, e.g., Tr. at 193-97.

[4] Q. We're talking about 310 slides, isn't that correct, sir?
A. I believe so, yes. [Tr. at 198.]

B. Determination of Damages Was An Issue of Fact, Not Law

9. Defendant argues that, according to certain decisions of other courts, there is no minimum industry standard as a matter of New York law, and falsely claims there was no evidence to support the jury's damage award. This argument is flawed for three reasons.

10. First, the issue is one of fact; the cases defendant cites are simply those in which a plaintiff failed to adduce evidence proving the existence of the industry standard in that Mr. Gasperini was not a party to those actions and is not collaterally estopped by the failure of an unrelated plaintiff to meet his or her burden of persuasion.

11. Second, case law makes clear that the New York courts recognize and enforce the minimum industry standard. Contrary to the misleading arguments in defendant's brief, New York courts have repeatedly upheld awards of $1,500 per slide.[5]

12. Third, there was ample evidence to support the award, specifically regarding (i) the quality and technical excellence of Mr. Gasperini's photographs; (ii) the extraordinary conditions under which the photographs were obtained; (iii) Mr. Gasperini's inability to recreate those conditions, as a studio photographer could do with a model shoot; (iv) the uniqueness of his photographs, given the remote places he traveled to, and the dangerous conditions under which they were obtained; (v) reflective value from group value of the individual images; (vi) defendant's acknowledgement of the professional quality of Mr. Gasperini's photographs; (vii) defendant's awareness of their value, as evidenced by defen-

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[5] *See*, plaintiff's pre-trial brief at pp 21-23, discussing, *inter alia*, *Girard Studio Group v. Young & Rubicam*, 147 A.D.2d 357, 536 N.Y.S. 709 (1st Dept. 1989) and *Hoffman v. Portogallo*, Supreme Court, N.Y. County, N.Y.L.J. February 16, 1987 (Gabel, J.), where the $1,500 minimum industry standard was enforced. Indeed, *Girard* is significant in that the Appellate Division *reduced* a higher award to the $1,500 industry standard minimum.

dant's admissions made to Mr. Gasperini, and as evidenced by the frantic efforts by defendant's employees to locate the lost slides; (viii) Mr. Gasperini's conduct in protecting and caring for his slides as valuable property; and (ix) the testimony of Jane Kinne, plaintiff's expert, the only witness at trial with experience in valuing photography, who specifically testified that Mr. Gasperini's photographs were worth $1,500 a piece.

THE VERDICT WAS FULLY SUPPORTED BY THE EVIDENCE

13. Defendant argues that: (i) its expert testified Mr. Gasperini's slides "had, at best, minimal market value" (Montbach Aff. at ¶ 6); (ii) Jane Kinne, plaintiff's expert, supposedly testified the industry standard was never followed (Montbach Aff. at ¶ 9); and therefore, (iii) the industry standard "was never factually or legally established." [Montbach Aff. at ¶ 10.]

14. The trial transcript refutes this argument conclusively. Plaintiff's expert testimony clearly established that the verdict was supported by the evidence, as she specifically testified that each slide was worth $1,500. That assessment was based on various factors, as discussed below, and reinforced by the testimony of numerous witnesses, including defendant's president and defendant's expert.

15. As demonstrated in the accompanying memorandum of law, where the jury's verdict involves assessment of the relative credibility of the experts, the verdict cannot be disturbed by a post-trial motion.

A. WILLIAM GOODMAN

16. William Goodman is defendant's President. He is a graduate of Princeton University and Columbia University Business School. The defendant is a business belonging to his family. His father is the Chairman.

17. In response to a direct questions from plaintiff's counsel herein, Mr. Goodman admitted that: (i) in producing his business records for trial, language demonstrating defendant's knowledge of the minimum industry standard was excised; and (ii) defendant was in fact aware of the minimum industry standard.

Q. And you were to search your records and to deliver to me the delivery memos, is that correct?
A. Correct.

* * *

Q. Mr. Goodman, isn't it true that on numerous of these exhibits that you have copied for me only the front and not the printed language on the back of the delivery memos?
A. Yes.

* * *

Q. And printed on the back of that document, the language you neglected to produce to me from your records, is the minimum industry standard of $1,500 per slide, isn't that correct?

* * *

A. the number $1,500 is on this document.

* * *

Q. Also in Plaintiff's Exhibit 30, the documents you produced this morning, is a delivery memo from Photo Researchers, Inc., Mr. Zentmaier's company, is that correct?
A. Yes.
Q. And that's to your company, isn't that correct?
A. Yes.
Q. It's your business record?
A. Yes.
Q. You also neglected to copy the back of that document and give it to me, isn't that correct?

A. Yes.

Q. You were here in court this morning and on Monday when Mr. Abady . . . examined Mr. Zentmaier and presented him the various documents in Exhibit 12 which were admitted in evidence from Photo Researchers?

A. Yes.

Q. And you heard him testify that the language on the back of his form was the same $1,500 industry standard, correct?

A. Yes.

Q. You heard that testimony?

A. Yes.

Q. Is there a reason why you didn't make me a copy of that from your records?

A. No, no reason.

* * *

Q. Isn't it true that you're aware of the industry standard, your company, Guidance Associates, the Center for Humanities?

A. Yes.

[Tr. at 173-78].[6]

18. Contrary to the assertion of defense counsel, Plaintiff proved both the existence of the minimum industry standard and defendant's awareness of it from the mouth of defendant's principal.

19. Further, Mr. Goodman acknowledged the quality of Mr. Gasperini's photographs.

Q. Mr. Goodman, Bill Gasperini's slides that were part of the three-part video series that you produced, which is Plaintiff's Exhibit 10, contained a number of shots taken from scenes of civil war in Central America, isn't that correct?

A. Yes.

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[6] *See* also, Tr. at 180-84, where the same admissions are repeated.

Q. And that was your prime motivation for selecting Mr. Gasperini's photos, was it not, sir? For use in the program?

A. Yes, sir.

A. Yes, that's correct.

Q. And you were quite pleased with the professional quality of Mr. Gasperini's work, were you not?

A. Yes, I was.

[Tr. at 187-88.]

20. Mr. Goodman also admitted to Mr. Gasperini the photographs were valuable, and further admitted he had everyone in his company search for them because of their value.

Q. I'll rephrase the question. During that telephone call from Moscow, Mr. Gasperini was very upset, was he not?

A. Yes.

Q. Upon learning that his slides were lost.

A. Yes.

Q. And during that conversation he told you they were valuable, didn't he.

A. Yes.

Q. And you told him you knew they were valuable?

A. Yes.

Q. And you told him because of that, that's why you conducted such an extensive search, isn't that correct?

A. Yes.

Q. And that not only did you instruct your staff to do so, but you yourself searched for the slides?

A. Yes, I did.

Q. And that you enlisted the support of almost everyone in your agency.

A. Yes.

Q. In your firm.

A. That's correct.

Q. About 40 people at the time.

A. Right.

B. ROBERT ZENTMAIER

21. During pre-trial discovery, defendant failed to produce copies of delivery memos in its files, despite repeated demand by counsel herein. On June 24, 1994, counsel herein wrote to Mr. Montbach demanding that documents previously requested be produced in court on June 27, 1994, the first day of trial. The documents were not produced.

22. In anticipation of defendant's default, counsel herein located Robert Zentmaier, and subpoenaed him to trial. Mr. Zentmaier is the President of Photo Researchers, Inc., one of the largest photo stock agencies in the country, which maintains about one million slides in inventory. [Tr. at 158.] He testified that defendant dealt repeatedly with his company in the past, going back to the late 1970's.[7]

23. Mr. Zentmaier established both the existence of the minimum industry standard,[8] and defendant's knowledge of it.

> Q. Mr. Zentmaier, to your knowledge have employees of the Center for Humanities been on your premises to pick up slide transparencies.
>
> A. Yes, they have.
>
> Q. And when they pick up slide transparencies on your premises, are they required to sign something?
>
> A. Yes, they are.
>
> Q. And what are they required to sign?
>
> A. A copy of the delivery memo.
>
> * * *

[7] Defense counsel distorts the record by referring to Mr. Zentmaier as an expert witness for plaintiff. [Montbach Aff. at ¶¶ 4 and 9.] Mr. Zentmaier was a fact witness, not an expert witness. He testified that he has never seen Mr. Gasperini's photographs. He was not asked, and did not testify, about his knowledge or experience in valuing photography. He gave only factual testimony about his company's dealings with the defendant, and the practices in his industry. Defense counsel asked him: "Sir, are you being compensated for being here today?" His answer was: "No, I'm not." [Tr. at 164.]

[8] This testimony occurred on the first day of trial; the transcript is not yet available, and hence, no page citation is given.

> Q. The question is: What is the purpose of having someone sign the delivery memo on your premises prior to taking slide transparencies off the premises?
>
> A. Well, it's to prove receipt and bind them to the terms of delivery.
>
> Q. And one of the terms of delivery is the industry standard of $1,500, is that correct?
>
> * * *
>
> A. Yes, it is.
>
> * * *
>
> Q. I place before you plaintiff's Exhibit 12G. Can you tell the jury what that is, Mr. Zentmaier?
>
> A. It's a copy of a delivery memo for photos submitted to Guidance Associates in October of 1993.
>
> Q. And did someone sign for that delivery memo from Guidance Associates?
>
> A. Yes, there's apparently an employee of Guidance Associates on the premises who did the selection of these images and she signed for them and she received them.
>
> Q. And could you tell the jury her name?
>
> A. Gretchen Jones.
>
> * * *
>
> Q. I'd like to show you now what's been marked as 12E . . . in evidence . . . and ask you to take a look at that and tell the jury what that document is?
>
> A. This is a copy of an invoice that was sent to Guidance Associates in May of 1993 for the use of a photograph on the cover of a catalogue.
>
> * * *
>
> Q. And on the invoice like the delivery memo is the industry standard also printed?
>
> A. Yes, it is.

[Tr. at 154-55; 165-66.]

24. Again, contrary to the assertion of defense counsel, plaintiff proved both the existence of the minimum industry standard and defendant's awareness of it from an independent fact witness whose company did business with defendant over several decades.

C. Charlotte Gasperini

25. Prior to the transaction between Mr. Gasperini and defendant, Mr. Gasperini kept his slides with his mother, Charlotte Gasperini.

26. Mrs. Gasperini's testimony demonstrated that she treated the slides as valuable property and kept them secure. Specifically, she testified that: (i) she lives in a carriage house on an estate surrounded by a fence several miles long, located in Chappaqua, New York; (ii) her house, and the others on the estate, are protected by an elaborate security system located in her dwelling; (iii) the slides were mounted in sheets inside binders, or in sealed plastic boxes supplied by the developer; (iv) these binders and boxes were kept in a storeroom accessible through an electronic door; and (v) she has never been burglarized.

> Q. What has been your attitude about maintaining Bill's slides?
>
> A. I've always felt that I was the guard to take care of them.

27. This testimony demonstrated the care Mr. Gasperini took in safeguarding his valuable property.

[Tr. at 200-03.]

D. William Gasperini

28. From Mr. Gasperini, the jury heard extensive testimony and received exhibits, any or all of which clearly supported its verdict in this case.[9]

[9] Because Mr. Gasperini's testimony was extensive, it is not recapitulated here at length. Instead, the topics he discussed are summarized herein.

29. Specifically, the jury heard Mr. Gasperini's testimony about:

(i) his educational and language credentials;

(ii) his experience as a foreign correspondent;

(iii) the importance of his background and training to his work as a professional photographer;

(iv) his experience as a photographer and photojournalist for more than a decade;

(v) the world class publications for which he has both written news stories and published photographs, including front page photographs;

(vi) the unique circumstances under which his photographs were taken, including travel to remote jungle and mountainous regions, and the dangers he was exposed to, including the risk of death, in obtaining many of his photographs;[10]

(vii) the unusual subject matter of his photographs;

(viii) the impossibility of recreating the conditions under which his lost photographs were taken;

(ix) the type of professional equipment he uses;

(x) the varying uses for his work, including newspapers, magazines, slides shows presented to educational institutions, computer programs, and advertising;

(xi) the extensive editing process he undertook to cull his 300 select photographs from the outtakes, which took several hundred hours over the course of a year;

[10] "The most graphic images I have were taken in 1989 when the leftist rebels launched an offensive to try to overthrow the government. It was an extremely dangerous situation, combat throughout the city. The day after I arrived, I went out with a couple of print reporters to an area and we were stopped at an army roadblock. A few moments later some shots rang out. One of my colleagues was shot and killed. Meanwhile, there were a lot of civilians trying to leave the battle zone, further up on the hillside, and they were waiving white flags. I also took a picture of a dead body in the gutter. Some of these were included in the 310 [lost photographs]." Tr. at 253.

(xii) his selective eye, and the method he uses in obtaining photographs;

(xiii) the role of his language abilities in capturing foreign subjects, either by persuading them to pose, or in obtaining their assent to his photographing them, or identifying other subjects to photograph;

(xiv) his career plans to synthesize and market his work, which included publication of a definitive pictorial of Central America in a time of civil war and turmoil, and thereafter, placement of his work in stock agencies for multiple and recurring uses;

(xv) the quality of his work, as demonstrated by his pictures from Asia, Africa, the Middle East, and the former Soviet Union;

(xvi) the quality of his work, as demonstrated by his pictures in defendant's video series, Conflict in Central America; and

(xvii) that the best work of his career were the 300 slides defendant lost.

[Tr. at 210-310, *passim*.]

30. Mr. Gasperini's testimony was both cogent and compelling. It is clear the jury was impressed with the breadth of his experience, the depth of his knowledge regarding the subject matters he photographed, and the quality of his work as a photographer. As demonstrated below, this testimony was amplified and reinforced by the opinion testimony of William Kuebler and Jane Kinne.

E. WIILIAM KUEBLER

31. Mr. Kuebler testified both as a fact witness and an expert witness. The jury heard his credentials, i.e. that: (i) he was an accomplished and award winning photographer; (ii) his photographs have been published in national media, such as USA Today, Sports Illustrated, Next Magazine, Women's Daily, and several books; and (iii) he is a photo editor with

the Gannett organization, one of the nation's largest newspaper chains, and has sixteen award winning photographers working under him.

32. Mr. Kuebler also testified that original slide transparencies are "kept under lock and key . . . [b]ecause they cost a lot of money to replace." [Tr. at 313]

Q. How much money do they cost to replace?

* * *

A. $1,500 was the last one I worked with.

Q. Is that the industry standard for a lost or damaged slide?

* * *

A. It's the industry minimum.

Q. Industry minimum. how long have you been aware of that industry minimum?

A. Probably about 15 years when I first started.

[Tr. at 313.]

33. Mr. Kuebler further testified that information about the minimum industry standard was readily and widely available to photographers and members of the industry. Specifically, he identified *The Photographers Marketplace*, *The Photographers Handbook*, and *The Photographers Buyers Guide* as the common and well-known sources in which the industry standard is published.

[Tr. at 313-14.]

34. Mr. Kuebler further testified to his familiarity with Mr. Gasperini's work, and compared it with the hundreds of other professional photographers whose work he has edited over his career.

Q. And of the photographs that you've seen taken by Bill Gasperini, how do those particular photographs, Exhibit 18, compare to the awardwinning photographs of other photographers or others in the Gannett organization?

A. These are all wonderful photographs. Their composition is excellent, their lighting is very good, subject matter is gripping. They are every bit as good, if not better, than the photographs that we've taken.

Q. How does Bill Gasperini's work as a photojournalist compare generally to the photojournalists whose work you edit on a daily basis?

A. Bill is an excellent photographer. His technical skills are great. His composition as I said before is wonderful. But more so I think it's his access to areas which is very important. He gets places where no one else goes, where our staff couldn't get.

[Tr. at 315-16.]

35. Mr. Kuebler was not paid for his appearance in court. [Tr. at 318.] From his testimony, the jury could determine that Mr. Gasperini's photographs were of exceptional quality and uniqueness, which itself fully supported the verdict.

F. JANE RINNE

36. Plaintiff's expert had impressive credentials concerning photography generally, and in the valuation of original photography specifically. Notably, defendant's expert did not begin to match Ms. Kinne's credentials in this regard. *See* ¶¶ 52-59, *infra*.

37. Ms. Kinne worked 47 years in the photo industry. Her credentials included: (i) running the photo agency of the National Audubon Society; (ii) 30 years at Photo Researchers, Inc., one of the largest stock agency in New York, including 12 years as its president; (iii) serving as Director of the editorial department at Comstock, another large photo stock agency; (iv) lifetime membership in the Picture Agency Council of America ("PACA"), the trade organization of photo stock agencies; (v) service as President of PACA, Chairman of the Legal Committee, and Chairman of the Executive Committee for six years; (v) service as National President and Chairman of the Legal Committee of the American Society of Picture Professionals; (vi) a sustaining member of

the American Society of Media Photographers, and a member of the Committee on Valuation; (vii) a speaker and panelist at every Photo Expo since its inception in 1983; (viii) panelist at the International Photographic Congress; and (ix) appraiser of photographs for tax purposes for universities, museums and galleries.

38. Ms. Rinne examined Mr. Gasperini's outtakes, his select pictures from Asia, Africa, the Middle East and the former Soviet Union, and interviewed him extensively regarding his techniques and editing.

39. Based on her experience, her evaluation of Mr. Gasperini and his work, she offered her professional opinion:

Q. What is your opinion of the quality of Mr. Gasperini's work?

A. I think he is a first class professional photojournalist.

[Tr. at 327.]

40. Ms. Kinne testified extensively about: (i) the variables used by photographers to take professional quality photographs; (ii) the technical process involved in taking photographs; (iii) the importance of a photographer's knowledge of the region and language skills; and (iv) the relationship of one photograph to a body of work, such as Mr. Gasperini's photographs of Central America.

41. Ms. Kinne also testified about the minimum industry standard.

Q. Ms. Kinne, could you tell the ladies and gentlemen of the jury is there an industry standard for a damaged or lost color slide transparency?

A. Yes, there is. . . . It's $1,500 per professional-taken and professionally-edited transparency.

Q. Are Mr. Gasperini's works as you have seen professionally taken?

A. Yes, they are.

Q. Are they professionally edited?

A. Yes, they are.

[Tr. at 332.]

42. Ms. Kinne also explained how the minimum industry standard was arrived at, and described in detail the survey conducted over several years by the American Society of Magazine Photographers in 1969 which included all sides of the photographic industry, including photographers, agents and users, such as advertising agencies, promotion firms, publishers of trade books, textbooks, encyclopedias, and producers of educational material, including the defendant.

43. She testified that "the average reuse figure and the figure for the outright sale of all rights was a $1,500 figure. That figure was then used starting in the early 70's and was actually printed in the 1973 Guide to Business Practices by ASMP." [Tr. at 334.]

44. Ms. Kinne testified that the minimum industry standard is published in industry guidebooks widely available to users such as the defendant, including *The Stock Photo Handbook* and the *Legal Handbook of the Picture Agency Council of America*.

45. Ms. Kinne further testified that there are 101 members of PACA, and that each and every one of them uses a delivery memo containing a minimum industry standard.

Q. And is the $1,500 minimum industry standard printed on each and every agency's delivery memo form?

* * *

The vast majority of the members in the Picture Agency Council use the $1,500 figure. A few are now using a $2,000 or $2,500 figure.

Q. That's the value of one color transparency?

A. One original color transparency.

[Tr. at 339.]

46. Ms. Kinne also testified about the criteria used to determine the value of original slides. These were: (i) the

"technical excellence of the photograph;" (ii) "the aesthetic value or the particular eye of the photographer;" (iii) "the value of the subject matter;" (iv) "the way the subject matter has been treated;" and (v) "the value of a particular photograph in relation to a whole, particularly a photojournalist where he's trying to tell an entire story." [Tr. at 343.]

47. She then described her interviews with Mr. Gasperini about his habits as an editor, and had him edit a cross-section of his material in her presence. She also viewed the defendant's video series, "Conflict in Central America."

48. Based on these criteria—independent of the industry standard—she valued Mr. Gasperini's photographs at $1,500 a piece.

Q. And based on all the work that you've just described, can you ascribe a value to the lost 310 slides?

A. Yes. And I valued them at $1,500 each.

[Tr. at 344.]

49. Ms. Kinne went on to explain how she arrived at that figure, discussing the variety of purposes for which Mr. Gasperini's photographs could have been used; the long period of time in which they would have generated revenue; the relationship of copyright to valuation; the range of fees that a single photograph could generate, giving a vivid example of how a photograph she managed, that of an eagle in a certain position, generated $20,000 since 1986 from the Postal Service; explaining the recurrent use of historical photographs, describing how photos from D-Day that sat is stock for 50 years recently generated revenue from the 50th Anniversary celebration reported in newspapers, magazines, and television; and to the multiple and varied uses available for Mr. Gasperini's photographs. [Tr. at 344-50-]

50. Finally, Ms. Kinne confirmed that the minimum industry standard is real and observed by members of the industry.

Q. Now, is the minimum industry standard of $1,500 largely observed by the industry or honored only in the breach?

* * *

A. [I]n the vast majority of cases they pay the $1,500.
Q. By "they" you refer to users such as the defendant?

* * *

Q. Is that correct?
A. Yes.

[Tr. at 351-52.]

51. On cross-examination, Ms. Kinne testified that there is demand today for photographs of Central America, such as Mr. Gasperini's lost slides, and that such demand has existed over the past ten years, and will likely arise again in the future. [Tr. at 360.]

G. DEFENDANT'S EXPERT AND SOLE WITNESS, GIDEON DE MARGITAY

52. One need only review the testimony of this witness and recall his demeanor on the witness stand to understand why the jury rejected his testimony.[11]

53. Mr. de Margitay's had no meaningful credentials in valuing photographs. He was not a member of any of the professional organizations, such as those Ms. Kinne led. He never served on any committee of any professional photographic organization dealing with valuation of photography, nor was he familiar with the methodology by which the minimum industry standard was developed. [Tr. at 392-94; 402.]

54. By his own testimony, his experience consisted essentially of being a purchaser of photographic material for reproduction. "I'm only a humble buyer of photography, sir." [Tr. at 404.]

[11] Indeed, while being cross-examined, defendant's counsel repeatedly raised his hand to restrain his own witness, signaling him to wait until counsel herein had finished asking questions.

55. In addition to the clear deficiency in training and experience, Mr. de Margitay was reluctant to give testimony on the critical issue in the case, i.e. the value of Mr. Gasperini's photographs.

Q. Do you have an opinion of the value of Mr. Gasperini's photos?
A. Again, if you forgive me I will not use the word value.

THE COURT: [If] [y]ou're not going to use the word value, I'm going to tell you not to answer.

* * *

Q. And in your review of Mr. Gasperini's work, have you been able to place a price on what you would pay for the missing slides?
A. Excuse me, I'm somewhat at a loss.

THE COURT: There's been no objection to the question so your answer is yes I can or no I can't.

Q. Yes or no?

A. I can't. It's too broad. I don't know what you mean.

[Tr. at 385; 391.]

56. Defendant's counsel asked Mr. de Margitay about the $1,500 minimum industry standard. In one breath, he denied the existence of the industry standard. In the next, however, Mr. de Margitay admitted: "And this $1,500 . . . became *tradition* in the picture business." (emphasis added) [Tr. at 380.]

57. Under cross-examination, de Margitay admitted he was aware of PACA, aware that its members all used delivery memos, but unaware of the industry standard printed on those documents. He confirmed that Magnum was the premier photo agency in the world, and then was forced to admit that the delivery memo used by Magnum clearly sets forth the $1,500 minimum industry standard. [Tr. at 396-97.]

58. Under further cross-examination, de Margitay admitted that the value of a photograph derived from the photographer's eye and his knowledge of the region and indigenous peoples being photographed. [Tr. at 406.] He further admitted that historical photographs such as Mr. Gasperini's have recurring value, and can be used in different contexts. [Tr. at 407.]

59. In sum, defendant's sole witness was unpersuasive in attempting to deny the existence of the industry standard, and was forced on cross-examination to admit facts which supported the jury's verdict.

THE VERDICT WAS NOT THE RESULT OF PASSION AND PREJUDICE

A. There is no evidence to support defendant's claim.

60. Defense counsel makes the bald claim that the verdict can be explained only by passion and prejudice. However, no evidence is submitted in support of this naked proposition. Indeed, the trial record is replete with evidence to refute it, as outlined above.

61. Rule 403 of the Federal Rules of evidence permits the exclusion of relevant evidence where its inflammatory nature is such that the probative value of the evidence is outweighed by the prejudice it would cause. As demonstrated in plaintiff's brief submitted herewith, Rule 403 favors the admission of evidence, and should be invoked sparingly.

62. Moreover, this is not the typical case where the grisly photograph of a severed limb or mutilated body will inflame the jury, and thereby prevent it from conducting a searching examination in its deliberations of the issues. No such inflamatory evidence was part of this case. Rather, the jury heard straightforward, non-emotive testimony in the context of an action for commercial bailment.

B. The Court gave repeated cautionary instructions.

63. Defendant's argument also conspicuously ignores the Court's repeated cautionary instructions to the jury given throughout the trial that there was no delivery memo from Mr. Gasperini to defendant. Such instructions avoided any possible prejudice or confusion.

> THE COURT: . . . It's understood that there's no delivery memo in this case.

[Tr. at 155.]

> THE COURT: The jury should understand that there is no evidence at the present that either of the parties to this litigation are members [of PACA] or bound by it. Also there's no delivery memo in this case.

[Tr. at 338-39.]

> THE COURT: I'll take the evidence subject to the cautionary instruction to the jurors that these particular parties in this particular case did not have such a memo. But they may consider the existence of this arrangement for whatever information it may supply to help them evaluate the missing slides.

[Tr. at 339.]

> THE COURT: I'll take them [delivery memos] with the understanding that they don't involve this defendant or this plaintiff.

[Tr. at 341.]

64. Likewise, in the charging conference the Court again made reference to the cautionary instruction given throughout the trial.

> THE COURT: The court has already given a cautionary instruction on the so-called industry standard. I will tell them that it's not applicable in this case because there is no delivery ticket incorporating such a provision. They can consider what other do as they find from the testi-

> mony for whatever evidence or whatever assistance it gives them in reaching their conclusion.

[Tr. at 414-15.][12]

THE COURT DID NOT IMPROPERLY LIMIT CROSS-EXAMINATION

65. Defense counsel blatently misrepresents the trial record by claiming: "There was no evidence submitted by plaintiff that any of the lost photographs were unique." [Montbach Aff. at ¶ 6.]

66. The testimony of William Kuebler, Jane Kinne, and Mr. Gasperini himself made plain that the lost photographs were in fact very unique.

67. Defense counsel further distorts the record in claiming:

> In fact, the Court, in precluding deponent from questioning plaintiff on the topic of the existence of other photographers at the times the lost photos were taken, stated that it was common knowledge that there were many other photographers present in Central America at the time plaintiff was taking his photographs.

[Montbach Aff. at 6.]

68. Defense counsel was in fact permitted to elicit testimony on precisely the point he claims to have been precluded on. [Tr. at 299-302.] Further, he had complete freedom to cross-examine Mr. Kuebler on this point, but chose not to. [Tr. at 316-17.] He did in fact cross-examine Ms. Kinne on this point. [Tr. at 360-62.]

---

[12] Notably, the Court's limiting instructions conformed precisely to the long standing rule in New York. Under general customs and usages, Richardson states at §187:

> Such evidence is received for what it is worth in view of all of the circumstances of the particular case, and, under proper instruction from the court as to its inconclusive nature, the jury has a right to give it such consideration as they think it should receive in connection with all the other facts. Shannahan v. Empire Engineering Corp., 204 N.Y. 543, 550, 98 N.E. 9, 11, 44 L.R.A. (NS) 1185; Welch v. Enright, supra.

69. In sum, there no is simply substance to this argument whatsoever.

THE MOTION IN LIMINE WAS PROPERLY DENIED; LIKEWISE, THE COURT'S JURY INSTRUCTIONS WERE CORRECT

70. Motions In Limine are widely used in criminal practice, but rarely in civil cases. Defendant's motion sought to prevent plaintiff's experts from testifying about the minimum industry standard. The purported legal basis was defendant's contention that the industry standard did not exist as a matter of law. At the outset of trial, the Court properly ruled that this was an issue of fact. The Court repeatedly advised defense counsel of that basic principle, during and even at the end of trial. [Tr. at 162; 419.]

71. As discussed above, the Court gave repeated cautionary instructions to the jury regarding the industry standard. As the Court noted in the charging conference, the jury learned from the evidence the history of the industry standard, and that all stock agencies use it, as every photograph has a value. The jury considered that only as one factor among the many other factors testified to by plaintiff's witnesses—and even admitted by defendant's expert—in arriving at its determination of the value of Mr. Gasperini's photographs.

72. In short, there is simply no legal merit to this argument.

CONCLUSION

73. The law is clear: neither defense counsel nor even the Court can substitute its finding of facts for that of the jury. In this case, defendant was afforded a full and fair opportunity to present all evidence in its favor, and to contest plaintiff's proof on each and every point.

74. The case was fairly tried, and the jury reached its verdict based on the evidence it received. As the record makes clear, the evidence fully supported the verdict.

75. Accordingly, defendant's Rule 59 motion should be denied in all respects.

76. We swear under the penalties of perjury of the laws of the United States that the foregoing is true and correct.

Dated: New York, New York
July 25, 1994

By: SAMUEL A. ABADY
Samuel A. Abady

By: JONATHAN S. ABADY
Jonathan S. Abady

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIV. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant, The Center For Humanities, Inc., d/b/a Guidance Associates, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment in favor of the plaintiff, William Gasperini, in the sum of $564,750.00 as against the defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, entered in this action on the 30th day of June, 1994, as well as the Order of the Court entered on the 29th day of July, 1994, denying defendant's motion pursuant to FRCP Rule 59.

Dated: New York, New York
August 11, 1994

BIGHAM ENGLAR JONES & HOUSTON
ATTORNEYS FOR DEFENDANT
THE CENTER FOR HUMANITIES, INC. D/B/A
GUIDANCE ASSOCIATES

BY: FRANCIS A. MONTBACH
FRANCIS A. MONTBACH (FM 9631)
A MEMBER OF THE FIRM
14 WALL STREET
NEW YORK, NY 10005-2140
(212) 732-4646

TO: SAMUEL A. ABADY, ESQ.
RUBEN, KALNICK & BAILIN
15TH FLOOR
405 PARK AVENUE
NEW YORK, NY 10022

JONATHAN S. ABADY, ESQ.
ATTORNEY FOR PLAINTIFF
SUITE 2C
251 WEST 91ST STREET
NEW YORK, NY 10028

No. 95-719

SUPREME COURT, U.S.
FILED
MAR 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
EXHIBITS
VOLUME II OF II
(Pages 359 to 445)

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Washington, D.C. 20036
(202) 955-8500

Attorneys for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1995
CERTIORARI GRANTED JANUARY 19, 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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The following opinion, orders and judgments have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari in No. 95-719

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PLAINTIFF'S EXHIBIT 1

(Letter of ***Guidance Associates*** Communications Park, Box 3000, Mount Kisco, New York 10549)

June 17, 1990

William Gasperini

LETTER OF AGREEMENT

Dear Bill:

This letter, when signed by both parties, shall constitute an agreement between Guidance Associates (hereinafter referred to as "GA") William Gasperini (hereinafter referred to as "WG").

GA will market the 3 part "Conflict in Central America" program to the educational market. GA or, at its option, its subsidiaries or affiliates will distribute the program with each party agreeing to the following:

1) WG grants to GA exclusive worldwide-educational (Junior and Senior High Schools and Junior Colleges) rights to distribute the Program for the term of this agreement.

2) WG grants to GA the right to reproduce, free of charge, visuals from the Program in any of GA's or its affiliates or subsidiaries promotion materials relating to the Program.

3) In consideration of the rights granted to GA herein, GA will pay WG a royalty of 15% of cash receipts (not including sales tax or shipping and handling) from sales of the program by GA and any company controlling, controlled by or under common control with GA.

4) GA shall account to WG twice yearly, within sixty (60) days after the close of its fiscal periods ending February

28 and August 31 and shall include the royalty payment due with such accounting. Said accounting shall show cash receipts for the Program. GA shall keep accurate books and records with respect to all transactions hereunder which may be examined by WG at its own expense with reasonable notice during regular business hours during the term hereof and thereafter until GA has distributed all of its remaining inventory of the Program or the Parts.

5) This agreement may not be assigned by either party without the express written consent of the other party, except this agreement may be assigned without such consent by either party in connection with the sale or transfer of all or a substantial part of the assets or stock of that party. This agreement may also be assigned to any affiliate or subsidiary of GA.

6) This agreement shall be construed under and in accordance with the laws of the State of New York.

7) No modification or cancellation of this agreement and no waiver of any breach or default hereof or hereunder shall be binding unless in writing and signed by both parties hereto.

8) This agreement contains the entire understanding between the parties hereto. There are no representations or undertakings by either of the parties hereto, except as expressly set forth herein.

Please confirm that the foregoing correctly, accurately and completely sets forth the understanding between us by signing below.

Sincerely,

/s/ WILLIAM E. GOODMAN
William E. Goodman

/s/ DAVID E. FREDRICKS
David E. Fredricks
Guidance Associates

Date

/s/ WILLIAM GASPERINI
William Gasperini
5356 El Dorado
El Corrito, CA 94530

July 17, 1990
Date

PLAINTIFF'S EXHIBIT 12A

PHOTO RESEARCHERS, INC. 60 EAST 56th STREET NEW YORK, N. Y. 10022 • (212) 758-3420

C# 133419
DM # 206099

TO THE CENTER FOR HUMANITIES, INC.
TWO HOLLAND AVENUE
WHITE PLAINS, NEW YORK 10603

DATE OCTOBER 31, 1977

ATTENTION WILMA MANN

INVOICE Nº 23718

FOR THE LOSS OF THE FOLLOWING ORIGINAL COLOR TRANSPARENCIES.

1	CLR	OD9659	SIGNS	V D Bucher	750.00
1	CLR	9TD016	OFFICE	W Von dem Bussche	750.00
1	CLR	9N4952	BOARDROOM	M P Mendheim	750.00
1	CLR	6A6100	CAFETERIA	B Roberts	750.00
3	CLR	1M9824 1M9832 1M9833	P.T.A. MEETING	D HANLEY	$500.00
				TOTAL DUE	$4500.00

[redacted]

TERMS AND CONDITIONS OF USE

1. A) Photographs remain the property of PHOTO RESEARCHERS, INC. ("PR"), or the particular photographers. User does not acquire any right, title or interest in or to any photograph, including, without limitation, any electronic or promotional right, and will not make, authorize or permit any use of the particular photograph(s) or plate(s) made therefrom, other than as specified herein. All photographs are to be returned within four (4) months after date of this invoice, except in cases of outright purchase.

B) User agrees to pay as reasonable charges, the sum of Five ($5.00) Dollars per week per color transparency and One ($1.00) Dollar per week per black and white positive, to PR after such four (4) month period, to date of return.

2. User is solely responsible for loss or damage to photographs and will indemnify PR against any loss or damage, commencing with receipt by User of such photograph until its return to, and receipt by, PR. In this connection, User assumes an insurer's liability herein for the safe and undamaged return of the photographs to PR. Such photographs are only to be returned either by messenger or by registered mail (return receipt requested), pre-paid and fully-insured.

3. The monetary damage for loss or damage of a photograph shall be determined by the value of such photograph. User agrees that the reasonable minimum value of such lost or damaged photograph shall be no less than Fifteen Hundred ($1,500) Dollars for a color transparency or black, and white negative. User acknowledges that this clause is essential and material to the making of this agreement. User shall be liable for all acts of its employees, agents, assigns, messengers and free-lance researchers for all loss, damage or misuse of the photographs.

4. Photographs used editorially shall bear a credit line as indicated by PR. User shall provide copyright protection to

the photograph granted to it. Such copyright shall be immediately assigned to PR, upon its request, without charge.

5. No model releases or other releases exists on any photographs unless the existence of such release is specified in writing by PR. User shall indemnify PR against all claims arising out of the use of any photographs where the existence of such release has not been specified in writing by PR. In any event, the limit of liability of PR shall be the sum paid to it pursuant to this invoice for the use of the particular photograph involved.

6. This agreement is not assignable or transferrable on the part of User.

7. Time is of the essence in the performance by User of its obligations for payments and return of photographs hereunder. No rights are granted until payment is made to PR even though User has received this invoice.

8. Only the terms of use herein set forth shall be binding upon PR. No purported waiver of any of the terms herein shall be binding on PR unless subscribed in writing by PR.

9. A Payment herein for such use is to be net ten (10) days. A service charge of one and one-half ($1^1/_2\%$) percent per month on any unpaid balance will be charged thereafter. Any claims for adjustment or rejection of terms, must be made to PR within ten (10) days after receipt of this invoice. In the event that any photographs are used by User in publications, where PR's payment is [ILLEGIBLE] or increment basis, then User shall send to PR, on a semiannual basis (June 30th and December 31st), a certified statement set [ILLEGIBLE] for the total number of sales, [ILLEGIBLE]

(Letterhead of **The Center for Humanities, Inc.**
Two Holland Ave./White Plains, New York 10603/
(914) 946-0601)

February 2, 1977

Mrs. Jane Kinne
Photo to Researchers Inc.
[ILLEGIBLE] East 56th Street
New York, New York

Dear Jane:

The following is a list of the pictures we talked about today on the phone:

		*021083**	
V. Bucher	Signs	D 9659✔—	*m*206008*
	220175		
W. von dem Bussche	Office-	0T0016✔	*206016*
	Wash.		
	08483		
D. Hanley	Meeting	1M9824✔	*2 Separate*
"	" *PTA*	1M9832	*Ret'd*
"	"	1M9833✔—	*206016*
M. P. Manheim	Lunchroom		
	131415	1N4152✔	
B. Roberts	Cafeteria		
	180750	6A6100✔	*206016*

If you find that these pictures have not been returned to your files, please contact Mr. Johnson so that he will know how to proceed.

Frederick
S.

Sincerely,

/s/ Wilma Mann
Wilma Mann

---

* Italic matter handwritten notation.

	①	②	③	④	⑤	⑥	⑦	⑧	⑨	⑩
IF EASE	DATE	CLIENT	INV	SUBJECT	PHOTOG.	BILLED	COMM.	DUE PHOTOG.	RAPHO	PD. BY CLIENT	PD. PHOTO
6	10/31/77	CTR.FOR HUMANITIES	23718	Signs 1 clr #DD9659	V.D. BUCHER	750.00	375.00	375.00	-	11-1-77 10-27-77	852
7		LOSS		Office 1 clr #DT0016	W.VON DEM BUSSCHE	750.00	375.00	375.00	-		~~924~~
8				Lunchroom 1 clr #1N4152	M.P. MANHEIM	750.00	375.00	375.00	-		852
9				Cafeteria 1 clr #6A6100	E. ROBERTS	750.00	375.00	375.00	-		810
10				#1M9824; 1M9832; 3 clr 1M9833 PTA Meeting	D. HANLEY	1500.00	750.00	750.00	-		909

PLAINTIFF'S EXHIBIT 12E

PHOTO RESEARCHERS, INC.
60 East 56th Street, New York, N.Y. 10022 (212) 758-3420

DATE : 05/27/93
CUST # 175613

GUIDANCE ASSOCIATES
90 SOUTH BEDFORD RD
COMMUNICATIONS PARK
MT. KISCO NY 10549

ATTENTION: SALLY PARIS

INVOICE # : 62085

FOR THE ONE TIME, NON-EXCLUSIVE UNITED STATES REPRODUCTION RIGHTS TO THE FOLLOWING PHOTOGRAPH(S) FOR USE ON THE COVER OF A CATALOG FOR "GA VIDEO" WITH A PRINT RUN OF 20,000.

PHOTO#	T	DESCRIPTION	PHOTOGRAPHER	PRICE
765532	C	STUDENTS — 5"x7	R. HUTCHINGS	700.00
			TOTAL DUE:	$700.00

NOTE: PLEASE SUPPLY US WITH TWO COPIES OF YOUR FINISHED PIECE.

NO RIGHTS GRANTED EXCEPT THOSE ABOVE.
SUBJECT TO TERMS ON REVERSE.

THANK YOU,
MERYL DELIERRE
OUR FEDERAL I.D. NUMBER IS: 13-1845475

TYPES: B–BLACK/WHITE, C–COLOR, V–CONVERSION
* USER SHALL NOT PERMIT PHOTOGRAPHS SUPPLIED TO BE USED IN A DEFAMATORY CONTEXT AND SHALL INDEMNIFY P.R. FROM CLAIMS OR SUITS ARISING THEREFROM.

Original Color Transparencies and Other Photographic Materials To Be Returned Unless Otherwise Indicated.
UNREPORTED REUSE OR EXTENDED USE
SUBJECT TO DOUBLE CHARGE

TERMS AND CONDITIONS OF USE

1. A) Photographs remain the property of PHOTO RESEARCHERS, INC. ("PR"), or the particular photographers. User does not acquire any right, title or interest in or to any photograph, including, without limitation, any electronic or promotional right, and will not make, authorize or permit any use of the particular photograph(s) or plate(s) made therefrom, other than as specified herein. All photographs are to be returned within four (4) months after date of this invoice, except in cases of out-right purchase.

B) User agrees to pay as reasonable charges, the sum of five ($5.00) Dollars per week per item to PR after such four (4) month period, to date of return.

2. User is solely responsible for loss or damage to photographs and will indemnify PR against any loss or damage, commencing with receipt by User of such photograph until its return to, and receipt by, PR. In this connection, User assumes an insurer's liability herein for the safe and undamaged return of the photographs to PR. Such photographs are only to be returned pre-paid and fully insured either by messenger or by registered mail (return receipt requested).

3. The monetary damage for loss or damage of a photograph shall be determined by the value of such photograph. User agrees that the reasonable value of such lost or damaged photograph shall be Fifteen Hundred ($1,500) Dollars for a color transparency or black and white negative. User acknowledges that this clause is essential and material to the making of this agreement. User shall be liable for all acts of its employees, agents, assigns, messengers and free-lance researchers for all loss, damage or misuse of the photographs.

4. Photographs used shall bear a credit line as indicated by PR. User shall provide copyright protection to the photograph granted to it. Such copyright shall be immediately assigned to PR or the photographer who took same upon its request, without charge.

5. No model releases or other releases exist on any photographs unless the existence of such release is specified in writing by PR. User shall indemnify PR against all claims arising out of the use of any photographs where the existence of such release has not been specified in writing by PR. User shall not permit photographs supplied to be used in a defamatory context and shall indemnify PR from claims or suits arising therefrom. In any event, the limit of liability of PR shall be the sum paid to it pursuant to this invoice for the use of the particular photograph involved.

6. This agreement is not assignable or transferrable on the part of User, unless agreed to in writing by PR.

7. Time is of the essence in the performance by user of its obligations for payments and return of photographs hereunder. No rights are granted until payment is made to PR even though User has received this invoice.

8. Only the terms of use herein set forth shall be binding upon PR. No purported waiver of any of the terms herein shall be binding on PR unless agreed to in writing by PR.

9. A) Payment herein for such use is to be net ten (10) days. A service charge of one and one-half (1½%) percent per month on any unpaid balance will be charged thereafter. Any claims for adjustment or rejection of terms, must be made to PR within ten (10) days after receipt of this invoice. User shall provide PR with two (2) free copies of such publications immediately upon printing.

B) When reporting usage, the user must inform PR of picture number, photographer, description, type and size of reproduction.

10. Recipient acknowledges that PR must be advised, in writing, of any reuse or extended use prior to publication. Failure to do so will result in a double fee charge. This is not a penalty but an agreed and stipulated fair charge.

11. No electronic reproduction rights or promotional rights are granted herein, unless specifically stated.

12. All rights not specifically granted herein to User are reserved for PR's use and disposition without any limitations whatsoever.

DISPUTES OR CLAIMS ARISING OUT OF USE

13. Any and all disputes arising out of, under or in connection with this agreement, including without limitation, the validity, interpretation, performance and breach hereof, shall be settled by arbitration in New York City, New York, pursuant to the rules of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction. This agreement, its validity and effect shall be interpreted under and governed by the laws of the State of New York. The User shall pay all costs of arbitration, plus legal interest on any award.

14. User agrees that the above terms are made pursuant to Article 2 of the UNIFORM COMMERCIAL CODE and agrees to be bound by same, including specifically the clause to arbitrate disputes.

LEGAL COSTS AND DISBURSEMENTS

15. If PR is caused to present claim or sum as a result of any breach of the above terms set forth, it shall be made whole for such reasonable legal fees and disbursements by the recipient or user herein.

©COPYRIGHT PHOTO RESEARCHERS, INC. 1984

CHECK DATE	CHECK NO.	VENDOR NO
06/03/93	36207	00012305

CODES

1 - Center for Humanities
2 - Science & Mankind
3 - Guidance Assoc.
4 - PMF Films
5 - Pathescope
6 - Vocational Media
7 - AutoVideo
8 - TEP

INVOICE DATE	INVOICE NO.	CODE	DESCRIPTION	TOTAL AMOUNT	DISCOUNT	NET AMOUNT
05/27/93	62085	3	INVOICE P0#	700.00		700.00
			TOTAL	700.00		700.00

PLAINTIFF'S EXHIBIT 12F

PHOTO RESEARCHERS, INC.
60 East 56th Street, New York, N.Y. 10022 (212) 758-3420

DATE : 10/20/93
CUST # 175613

GUIDANCE ASSOCIATES
90 SOUTH BEDFORD RD
COMMUNICATIONS PARK
MT. KISCO NY 10549

ATTENTION: SALLY PARIS

INVOICE # : 63677

FOR THE ONE TIME, NON-EXCLUSIVE UNITED STATES REPRODUCTION RIGHTS TO THE FOLLOWING PHOTOGRAPH(S) FOR USE ON THE COVER OF A CATALOG WITH A PRINT RUN OF 18,000.

PHOTO#	T	DESCRIPTION	PHOTOGRAPHER	PRICE
785505	C	MIXED ETHNIC GROUP — COVER	R. HUTCHINGS	750.00
			TOTAL DUE:	$750.00

NOTE: PLEASE SUPPLY US WITH TWO COPIES OF YOUR FINISHED PIECE.

NO RIGHTS GRANTED EXCEPT THOSE ABOVE.
SUBJECT TO TERMS ON REVERSE.

THANK YOU,
MERYL DELIERRE
OUR FEDERAL I.D. NUMBER IS: 13-1845475

TYPES: B–BLACK/WHITE, C–COLOR, V–CONVERSION

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Original Color Transparencies and Other Photographic Materials To Be Returned Unless Otherwise Indicated.
UNREPORTED REUSE OR EXTENDED USE
SUBJECT TO DOUBLE CHARGE

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2. User is solely responsible for loss or damage to photographs and will indemnify PR against any loss or damage, commencing with receipt by User of such photograph until its return to, and receipt by, PR. In this connection, User assumes an insurer's liability herein for the safe and undamaged return of the photographs to PR. Such photographs are only to be returned pre-paid and fully insured either by messenger or by registered mail (return receipt requested).

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4. Photographs used shall bear a credit line as indicated by PR. User shall provide copyright protection to the photograph granted to it. Such copyright shall be immediately assigned to

PR or the photographer who took same upon its request, without charge.

5. No model releases or other releases exist on any photographs unless the existence of such release is specified in writing by PR. User shall indemnify PR against all claims arising out of the use of any photographs where the existence of such release has not been specified in writing by PR. User shall not permit photographs supplied to be used in a defamatory context and shall indemnify PR from claims or suits arising therefrom. In any event, the limit of liability of PR shall be the sum paid to it pursuant to this invoice for the use of the particular photograph involved.

6. This agreement is not assignable or transferrable on the part of User, unless agreed to in writing by PR.

7. Time is of the essence in the performance by user of its obligations for payments and return of photographs hereunder. No rights are granted until payment is made to PR even though User has received this invoice.

8. Only the terms of use herein set forth shall be binding upon PR. No purported waiver of any of the terms herein shall be binding on PR unless agreed to in writing by PR.

9. A) Payment herein for such use is to be net ten (10) days. A service charge of one and one-half ($1^1/_2\%$) percent per month on any unpaid balance will be charged thereafter. Any claims for adjustment or rejection of terms, must be made to PR within ten (10) days after receipt of this invoice. User shall provide PR with two (2) free copies of such publications immediately upon printing.

B) When reporting usage, the user must inform PR of picture number, photographer, description, type and size of reproduction.

10. Recipient acknowledges that PR must be advised, in writing, of any reuse or extended use prior to publication.

Failure to do so will result in a double fee charge. This is not a penalty but an agreed and stipulated fair charge.

11. No electronic reproduction rights or promotional rights are granted herein, unless specifically stated.

12. All rights not specifically granted herein to User are reserved for PR's use and disposition without any limitations whatsoever.

DISPUTES OR CLAIMS ARISING OUT OF USE

13. Any and all disputes arising out of, under or in connection with this agreement, including without limitation, the validity, interpretation, performance and breach hereof, shall be settled by arbitration in New York City, New York, pursuant to the rules of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction. This agreement, its validity and effect shall be interpreted under and governed by the laws of the State of New York. The User shall pay all costs of arbitration, plus legal interest on any award.

14. User agrees that the above terms are made pursuant to Article 2 of the UNIFORM COMMERCIAL CODE and agrees to be bound by same, including specifically the clause to arbitrate disputes.

LEGAL COSTS AND DISBURSEMENTS

15. If PR is caused to present claim or sum as a result of any breach of the above terms set forth, it shall be made whole for such reasonable legal fees and disbursements by the recipient or user herein.

©COPYRIGHT PHOTO RESEARCHERS, INC. 1984

CHECK DATE	CHECK NO.	VENDOR NO
11/24/93	37895	00012305

CODES
1 - Center for Humanities
2 - Science & Mankind
3 - Guidance Assoc.
4 - PMF Films
5 - Pathescope
6 - Vocational Media
7 - AutoVideo
8 - TEP

INVOICE DATE	INVOICE NO.	CODE	DESCRIPTION	TOTAL AMOUNT	DISCOUNT	NET AMOUNT
10/20/93	63677	3	INVOICE PO#	750.00		750.00
			TOTAL	750.00		750.00

PLAINTIFF'S EXHIBIT 12G

60 EAST 56th STREET NY, NY 10022
212 758-3420

PHOTO RESEARCHERS, INC.

DELIVERY MEMO # 093822

GRETCHEN JONES
GUIDANCE ASSOCIATES
90 SOUTH BEDFORD RD
COMMUNICATIONS PARK
MT. KISCO NY 10549

RECEIVED AND TERMS OF DELIVERY
ACCEPTED: Gretchen Jones
DATE: Oct 7, 1993

A COPY OF THIS DOCUMENT MUST BE ENCLOSED WITH EACH RETURN.

DATE	USE	LIBRARY	RESEARCHERS	CUST NO	CLR	B & W	SUBJECT
10-07-93	Z	G	MD	175613	9	0	TEENAGERS + VOCATIONS

MINIMUM FEE OF $225 PER PHOTO FOR REMOVING SEAL OR COPYING IMAGE.

TRANSPARENCIES OR PRINTS SUBMITTED

	(V)		(V)		(V)		( )		(V)		(V)		(V)		(V)		(V)		(V)
6D3606		7F0941		7F9866		7R4828		7S2978		7S5505		7S5567		C79701		S0943A			

PLAINTIFF'S EXHIBIT 12 g

PLEASE NOTE:

All photographs are submitted subject to terms on reverse side

Return the copy of this document when you return photos.
Circle the numbers of photos you are holding.
Fill in the number of photos you are returning.

BLACK-AND-WHITE _____ 2¼" COLOR _____

35MM COLOR _____ OTHER SIZE COLOR _____

AUTHORIZED SIGNATURE _____ MG.I

VALUABLE ORIGINAL COLOR TRANSPARENCIES MAY NOT BE PROJECTED

THANK YOU

©COPYRIGHT PHOTO RESEARCHERS, INC. 1985

TERMS OF DELIVERY OF GOODS

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2. Photographs may not be used in any way, including layouts, sketches and photostats, until submission of an Invoice indicating Recipient's right to use same, or purchase of the photographs outright, which shall be only on the Terms of Use as hereinafter specified.

3. Recipient is responsible for loss or damage to the photographs delivered to it, from time of receipt until their return to PR. Projection of transparencies is not permitted. Recipient shall be responsible for safe delivery and return of the photographs to PR and shall indemnify PR against any loss or damage to the photographs in transit or while in the possession of Recipient. This agreement is not considered a bailment and is specifically conditioned upon the items so delivered being returned to PR in the same condition as delivered. Recipient assumes an insurer's liability herein for the safe and undamaged return of the photographs to PR. Such photographs are to be returned either by messenger or by registered mail (return receipt requested), pre-paid and fully-insured.

4. PR count shall be considered accurate and quality deemed satisfactory for reproduction if PR is not immediately notified in writing by return mail with all exceptions duly noted.

5. The monetary damage for loss or damage of an original color transparency or photograph shall be determined by the value of each individual photograph. Recipient agrees, however, that the reasonable value of such lost or damaged

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photograph or transparency shall be Fifteen Hundred ($1,500) Dollars. PR agrees to the delivery of the goods herein only upon the express covenant and understanding by Recipient, that the terms contained in this paragraph 5 are material to this agreement. Recipient assumes full liability for its employees, agents, assigns, messengers and free-lance researchers for the loss, damage or misuse of the photographs.

DISPUTES OR CLAIMS ARISING OUT OF DELIVERY OF GOODS

6. Any and all disputes arising out of, under or in connection with this delivery, including without limitation, the validity, interpretation, performance and breach hereof, shall be settled by arbitration in New York City, New York, pursuant to the rules of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction. This agreement, its validity and effect shall be interpreted under and governed by the laws of the State of New York. Recipient shall bear all costs or arbitration plus legal interest on any award.

7. Recipient agrees that the terms herein are made pursuant to Article 2 of the UNIFORM COMMERCIAL CODE and agrees to be bound by same, including specifically the clause to arbitrate disputes.

TERMS AND CONDITIONS OF USE

1. A) Photographs remain the property of PHOTO RESEARCHERS, INC. ("PR"), or the particular photographers. User does not acquire any right, title or interest in or to any photograph, including, without limitation, any electronic or promotional right and will not make, authorize or permit any use of the particular photograph(s) or plate(s) made therefrom, other than as specified herein, All photographs are to be returned within four (4) months after date of this invoice, except in cases of outright purchase.

B) User agrees to pay as reasonable charges, the sum of five ($5.00) Dollars per week per item to PR after such four (4) month period, to date of return.

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B) When reporting usage, the user must inform PR of picture number, photographer, description, type and size of reproduction;

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LEGAL COSTS AND DISBURSEMENTS

15. If PR is caused to present claim or suit as a result of any breach of the above terms set forth, it shall be made whole for such reasonable legal fees and disbursements by the recipient or user herein.

PLAINTIFF'S EXHIBIT 12H

DELIVERY MEMO # 090630

60 EAST 56th STREET NY, NY 10022
212 758-3420

PHOTO RESEARCHERS, INC.

SALLY PARIS
GUIDANCE ASSOCIATES
90 SOUTH BEDFORD RD
COMMUNICATIONS PARK
MT. KISCO NY 10549

A COPY OF THIS DOCUMENT MUST BE ENCLOSED WITH EACH RETURN.

DATE	USE	LIBRARY	RESEARCHERS	CUST NO	CLR	B & W	SUBJECT
05-25-93	Z	G	MD	175613	22	0	ETHNIC HIGH SCHOOL STUDENTS-MIX

A SERVICE CHARGE OF 90.00 ACCOMPANIES SUBMISSION.
MINIMUM FEE OF $225 PER PHOTO FOR REMOVING SEAL OR COPYING IMAGE.

TRANSPARENCIES OR PRINTS SUBMITTED

	(√)		(√)		(√)		( )		(√)		(√)		(√)		(√)		(√)
6W5546		6W5550		7A0882		7A4014		7C0332		7D3408		7J1924		7K4451		7P2488		7P2492
7Q3154		7R1174		7S2977		7S5524		7S5532		7S5547		7T5433		7U5304		7U7233		7U7316
7W9295		C1216T																

PLEASE NOTE:

All photographs are submitted subject to terms on reverse side.

Return the copy of this document when you return photos.
Circle the numbers of photos you are holding.
Fill in the number of photos you are returning.

BLACK-AND-WHITE

2¼" COLOR

35MM COLOR

OTHER SIZE COLOR

AUTHORIZED SIGNATURE

LK

VALUABLE ORIGINAL COLOR TRANSPARENCIES MAY NOT BE PROJECTED

THANK YOU

©COPYRIGHT PHOTO RESEARCHERS, INC. 1985

TERMS OF DELIVERY OF GOODS

1. Photographs or transparencies (thereafter "photographs") may be held for fourteen (14) days approval. Unless a longer period is requested, and granted by PHOTO RESEARCHERS, INC. (hereafter "PR"), in writing, a holding fee of Five ($5.00) Dollars per week per item will be charged after such fourteen (14) day period and up to the time of return.

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5. The monetary damage for loss or damage of an original color transparency or photograph shall be determined by the value of each individual photograph. Recipient agrees,

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however, that the reasonable value of such lost or damaged photograph or transparency shall be Fifteen Hundred ($1,500) Dollars. PR agree to the delivery of the goods herein only upon the express covenant and understanding by Recipient, that the terms contained in this paragraph 5 are material to this agreement. Recipient assumes full liability for its employees, agents, assigns, messengers and free-lance researchers for the loss, damage or misuse of the photographs.

DISPUTES OR CLAIMS ARISING OUT OF DELIVERY OF GOODS

6. Any and all disputes arising out of, under or in connection with this delivery, including without limitation, the validity, interpretation, performance and breach hereof, shall be settled by arbitration in New York City, New York, pursuant to the rules of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction. This agreement, its validity and effect shall be interpreted under and governed by the laws of the State of New York. Recipient shall bear all costs or arbitration plus legal interest on any award.

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returned within four (4) months after date of this invoice, except in cases of outright purchase.

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B) When reporting usage, the user must inform PR of picture number, photographer, description, type and size of reproduction;

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PLAINTIFF'S EXHIBIT 13A

PHOTO RESEARCHERS, INC.

60 East 56th Street, New York, New York 10022

212 758-3420

A COPY OF THIS MEMO MUST BE RETURNED WITH THIS SUBMISSION.

DELIVERY MEMO

CTL NOS	DATE	A B C D E F G H I J K L M N O P Q R S T	ID	RESEARCHER	CUST NO	CLR	B & W	OTHER INFORMATION

TRANSPARENCIES OR PRINTS SUBMITTED

	(✓)		(✓)		(✓)		(✓)		(✓)		(✓)		(✓)		(✓)		(✓)	
1																		
2																		
3																		
4																		
5																		
6																		
7																		
8																		
9																		
10																		

PLEASE NOTE:

1 All photographs are submitted subject to terms on reverse side

Return the copy of this form when you return photos.
Check off in the column provided (✓) the numbers of photos you are returning.
Circle the numbers of photos you are holding.
Fill in the number of photos you are returning.

BLACK-AND-WHITE _____ 2¼" COLOR _____

35MM COLOR _____ OTHER SIZE COLOR _____

AUTHORIZED SIGNATURE _____

VALUABLE ORIGINAL COLOR TRANSPARENCIES MAY NOT BE PROJECTED

THANK YOU

© COPYRIGHT PHOTO RESEARCHERS, INC. 1973

TERMS OF DELIVERY OF GOODS

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Dollars. PR agree to the delivery of the goods herein only upon the express covenant and understanding by Recipient, that the terms contained in this paragraph 5 are material to this agreement. Recipient assumes full liability for its employees, agents, assigns, messengers and free-lance researchers for the loss, damage or misuse of the photographs.

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PLAINTIFF'S EXHIBIT 13B

MAGNUM

MAGNUM PHOTOS, INC. New York
72 Spring Street, N. Y. 10012
Tel. 966-9209
Telex: 420339

The material listed above is submitted by examination only. Photographs may not be reproduced, copies, projected or publicly displayed without the express written permission of Magnum as indicated by an invoice sent by Magnum to the client. Please acknowledge receipt of the transparencies and/or prints listed above by signing and returning the attached copy.

Receipt of the material listed above constitutes agreement by the recipient to the following conditions:

1. A holding fee of $1.00 per day per color transparency (0.50 per day b/w print) will be billed on material held longer than 21 business days.

2. Recipient assumes all risk for safe return of listed material to Magnum. In the event of any loss or damage of an original transparency (or photograph), the recipient shall pay to Magnum damages based on the value of each individual photograph, with a minimum value of $1,500 per transparency.

3. No model release or other release exists for any of the photographs submitted unless the existence of such release is specifically acknowledged in writing by Magnum. Further, Magnum assumes no responsibility for any captions or other wording which is not supplied by

Magnum but is used by the recipient in connection with other publication or other reuse of the photograph(s).

4. Should the client decide to purchase rights for any photograph(s) as evidenced by an invoice issued by Magnum, each published photo must be accompanied by a copyright notice in the names of both Magnum and the photographer, in the event that the copyright notice is omitted, Magnum will charge an additional one hundred percent of the reproduction fee.

PLAINTIFF'S EXHIBIT 13C

DELIVERY MEMO

CONTACT PRESS IMAGES INC.
116 East 27th Street, New York NY 10016 USA
Telephone 212 481-6910
Fax 212 481-6909
Telex 236 354 CPI

Delivery Memo #

Date:
Client:
Address:

Phone:
Attn:
Researcher/Editor:

It is essential that this delivery memo, or a copy of it, is returned with the material enclosed.

Terms

Research/Service Fee

The enclosed photographs are subject to the terms and conditions stated on the reverse side of this delivery memo.

SUBJECT/TITLE PHOTOGRAPHER COLOR B&W ORIGINALS DUPES

Press Material Value: Totals ☐ ☐

To The Attention Of The Customs Authorities of:

THE TERMS AND CONDITIONS SET FORTH HERE AND ON THE REVERSE SIDE ARE DEEMED INCORPORATED HEREIN AND MADE A PART HEREOF

1. Photographs or transparencies ("Photographs"), may be held on approval by the client until the date written on the reverse side of this agreement, or, if no date is set forth, for 14 days from the date of receipt. The client shall return to CONTACT PRESS IMAGES, Inc. ("CPI"), all photographs, other than those selected for further consideration or use, on or before the above stated date of return or pay a holding fee of $25 per week per color transparency and $5 per week per black and white print from that date to the actual date of return. For those photographs selected by client for use or further consideration, CPI shall promptly submit an invoice with the terms of payment.

2. *Photographs may not be used in any way, including layouts, sketches, photostats, or computer or other electronic composition, in whole or in part,* except in accordance with the term hereof and until submission of an invoice relating to the use of purchase of the photographs. Transparencies may not be projected unless specifically authorized in writing by CPI.

3. With respect to all photographs submitted on approval, a minimum research fee of $ 50 per consignment will be charged. A fee of $ 25 per transparency will be charged for any returned transparency not reproduced that requires remounting.

4. Submission of an invoice by CPI grants to client a license to use the photographs solely for the use specified on the invoice. No other uses, including promotional uses, of the photographs are authorized or permitted. *Nothing herein shall license the alteration of any of the photographs by computer, or by mechanical or other electronic means without the prior written permission of CPI.* Unless otherwise specifically

stated in writing, all photographs remain the property of CPI or its represented photographers. Said license is limited to use in the United States only, unless otherwise specified in writing, and the client does not acquire any other right, title or interest in the photographs, including, without limitation, any reproduction thereof, in whole or in part, by computer, electronic or mechanical means.

5. Photographs selected for further consideration or use shall be returned to CPI on or before the return date written on the reverse side hereof or, if no date is set forth, within three months following the date of invoice, except in cases of outright purchase. Client agrees to pay a holding fee of $ 25 per week per color transparency and $ 5 per week for each black and white print retained after the designated return date.

6. The client is responsible for loss or damage to the photographs from the time of receipt by client until their return to CPI. *Client assumes an absolute liability, as if it were an insurer, for the safe and undamaged return of the photographs to CPI* by bonded messenger, registered or certified mail (return receipt requested), prepaid and fully insured or by air courier.

7. In the event of any loss or damage to any of the photographs, client agrees to pay promptly to CPI the full value of the lost or damaged photographs. Client agrees that the reasonable minimum value of any lost or damaged original color transparency or color or black and white negative shall be no less than $2,000 and that this is a MATERIAL CONDITION of this agreement. Client's liability for loss or damage hereunder shall include the acts or omissions not only of employees, agent and independent contractors of client but also, without limitation, those of any persons handling or having custody or possession of photographs at the direction of, with the permission of, or for the benefit of client.

8. Unless specifically stated in writing by CPI, *CPI makes no representations as to the existence of model releases or*

other authorizations to use the photographs. Client shall indemnify CPI against and hold it harmless from all claims arising out of the client's use of any photographs. In any event, the maximum liability of CPI to the client under this agreement shall be the sums paid to CPI by the client hereunder for the use of the photographs.

9. This agreement is not assignable or transferable by the client. No modification or waiver of any of the terms of this agreement shall be binding on CPI unless subscribed to in writing by CPI.

10. Client's rights to the use of the photographs are specifically conditioned upon prior receipt of payment hereunder by CPI.

11. *Full payment is due within 30 days from date of invoice. A service charge of 2% per month on any unpaid balance will be charged thereafter.* The client shall notify CPI immediately of its intended uses of the photographs provided hereunder and shall, upon publication or use, promptly furnish to CPI three copies of each printed use and/or one copy of each electronic use of the photographs.

12. *The photographs used must be credited to: [name of photographer / CPI]* with an appropriate copyright notice as indicated on the transparency mount or on the photographs or in such other manner as CPI may approve in writing. Photographs published or used without credit or with improper credit to the photographer or CPI will be subjected to a surcharge of 100% of the fee or 200% if both credits are improper or absent.

13. Client shall reimburse CPI for its reasonable legal fees and disbursements in the event CPI is caused to present claim or suit as a result of client's breach of any of the terms of this agreement.

14. In the event of loss or damage of any transparencies or negatives from an assignment, client agrees that the minimum

refundable value of each transparency or negative shall be no less than $ 2,000 and that this constitutes a MATERIAL CONDITION of this agreement.

15. Any and all disputes arising out of, under, or in connection with this agreement, including without limitation the validity, interpretation, performance and breach hereof, shall be resolved by arbitration in New York City, New York pursuant to the rules of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of the forum, State or Federal, having jurisdiction. This agreement, its validity and effect, shall be interpreted under and governed by the laws of the State of New York.

TERMS OF ASSIGNMENT

1. All photographs and/or raw film submitted as part of an assignment taken on assignment are for one-time editorial use only unless otherwise specified in advance and on the delivery memo.

2. Unless otherwise specified, photographers on assignment are the sole owners of the photograph's copyright. This right will not be transferred without the prior written permission of the photographer and/or CPI.

3. Assignments not immediately used may be held for:

- up to three months (in the case of a weekly)
- up to one year (in the case of a monthly)

4. Unless otherwise specified at the time the assignment is given, all film, including selects and out-takes and used images are to be returned to CPI within the week following publication. A certain number of duped selects may be retained with permission of the photographer and/or CPI.

5. In the event of loss or damage of any transparencies or negatives from an assignment, client agrees that the minimum

refundable value of each transparency or negative shall be no less than $ 2,000 and that this constitutes a MATERIAL CONDITION of this agreement.

PLAINTIFF'S EXHIBIT 13D

SPORTS ILLUSTRATED
A DEPARTMENT OF TIME INC.

TimeInc.Magazines
THE TIME INC. MAGAZINE COMPANY

TIME & LIFE BUILDING — 20th Floor
1271 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10020
(212) 522-4781
FAX 212-522-0102

PICTURE SALES

SUBMISSION DATE:	SUBMISSION ID NO.
LICENSED TO:	SENT TO:
CLIENT:	P.O. NO.
	CLIENT APPROVAL, IN ACCORDANCE WITH THE TERMS SET FORTH ON BOTH SIDES OF THIS FORM
SUBMITTED TO:	CLIENT SIGNATURE:

Licensee should sign and return the copy of this form to confirm his order. An invoice will be sent promptly after receipt of confirmation and payment will be due immediately upon receipt of invoice. Grant of reproduction rights is conditioned on receipt of payment.

TERMS AND CONDITIONS

1. Inspection—Material may be held for 15 days from the date of this Delivery Note. Material is furnished solely for inspection and may not be published, reproduced, copied, displayed, or used in any other fashion. You shall promptly return all photographs you decide not to use. A holding fee of $5.00 a week will be charged for each transparency or print held longer than 15 days unless, prior thereto, an extension of the inspection period is mutually agreed upon in writing.

2. All prints, negatives, and transparencies remain the property of Time Inc. and must be returned immediately after use, unless otherwise specifically stated.

3. You assume responsibility, and hereby indemnify Time Inc., for loss of or damage to all prints, negatives, and transparencies supplied to you until all such material is received at this address in good condition. The full value of each transparency, negative or print submitted herein is payable by licensee in case of loss or damage ($1500 per original film image, $150 per duplicate or print, unless otherwise stated on reverse): A surcharge of $25.00 is made on any transparency returned in other than the mount in which submitted.

4. Photographs must be reproduced exactly as furnished without alteration or cropping, unless the change has been approved by Time Inc. in writing.

5. When reproducing text, no omission of any kind may be made. If the text is translated, it shall be done so as not to change the meaning through translation. Any translated material remains the sole property of Time Inc. and may not be reproduced without the consent of Time Inc.

6. Time Inc. makes no representation or warranty with respect to the utilization by you of the names and likenesses of individuals or other entities depicted in the

photographs. You assume responsibility for obtaining whatever permission may be required from said individuals or entities and hold Time Inc. harmless from and against any and all claims, including reasonable counsel fees, arising out of your use of the material.

7. Credit and copyright notice must be given exactly as specified on back of each photograph or slide mount, or on the front of this form, and placed in such a manner and location as to give reasonable notice of claim of copyright. Omission of credit and copyright line as requested will entail a penalty equal to double the use fee quoted.

8. The photographs and/or text is licensed on a one-time, nonexclusive, nonassignable, nontransferrable, basis solely for the purpose set forth on the front page of this form. No other use of the material may be made without the express consent of Time Inc.

9. Unless otherwise specifically stated, service charges and laboratory fees are payable whether or not the photographs are used. Service charges are subject to State sales tax.

10. You will furnish Time Inc. with two copies of the work containing the licensed photographs or text immediately following publication.

PLAINTIFF'S EXHIBIT 13E

INVOICE

Impact Visuals
Photo & Graphics, Inc.
28 West 27 Street, Suite 901, New York, NY 10001 U.S.A.
212-683-9688
Fax 212-725-8318

Delivery/Invoice #

Date Shipped: _____

Date due to be Returned: _____

Name:
Billing: ⌐ ¬ Shipping:

Phone: Phone:

ITEM NUMBER	ARTIST/ RETURNED	DESCRIPTION	PHOTOGRAPHER

Total number of visuals enclosed:	Number of visuals used Cost per image used Research fee Shipping cost Balance due

Please see other side for terms.

RULES FOR USAGE OF PHOTOGRAPHS & ART FROM IMPACT VISUALS PHOTO & GRAPHICS, INC.

By accepting delivery of the enclosed materials, you agree to the following terms and conditions and unless we receive written objection within three days the count will be deemed accurate and the quality satisfactory:

1. **CREDIT MUST READ: "Artist's or Photographer's Name, Impact Visuals"** and must appear adjacent to the visual in not smaller than four point type. Failure to do shall increase fee three fold.

2. Material is **licensed** from Impact Visuals only **for editorial use** unless accompanied by a written release from Impact Visuals for other use. (That means photos and graphics supplied by Impact Visuals are not to be used in any advertising or in product creation such as postcards, t-shirts, etc., without special written permission from Impact Visuals). No material distributed by Impact Visuals may be resyndicated. Material is licensed for one-time use only unless written permission to the contrary is provided by Impact Visuals.

3. Invoices are **payable upon receipt**. One percent per month finance charge is applied on any balances unpaid after thirty days. Prior to usage, user must negotiate terms for reproduction of any and all photographs or graphics.

4. Material received from Impact Visuals must be **returned undamaged within 14 days** of being shipped from Impact Visuals unless a written extension is granted by Impact Visuals. Material held up to 14 days past the return due date will cost an additional $1 per visual per day. Photos or graphics not returned within 60 days of the return due date will be considered lost. Lost, damaged, or destroyed original artwork, negatives or transparencies will be paid for based on the value of each piece, but the recipient agrees, that the reasonable minimum value of each lost or damaged negative, transparency, or original artwork shall be no less than $1,500.00.

Lost or damaged photographic prints and copies of artwork will be paid for based on the value of each piece, but the recipient agrees that the minimum value of each piece will be no less than $150.00.

5. **Client assumes all shipping costs** both ways whether or not the material is published by the client.

6. Impact Visuals reserves the right to shorten the duration of the holding period (by phoned or written notice) if, in our opinion, the materials become associated with a breaking news event.

7. **No model releases** or other releases exist on photographs or graphics from Impact Visuals and user shall indemnify Impact Visuals and its photographers and artists against all claims arising out of the use of any graphic, photograph, or caption. The limit of liability of Impact Visuals shall be the invoice price of such a graphic or photo.

8. Clients must keep Impact Visuals **notified of the total circulation** of any materials using images from Impact Visuals.

9. Recipient consents to personal jurisdiction and venue in the County and State of New York in the appropriate State or Federal Court having subject matter jurisdiction over any dispute in any way relating to this delivery memo/invoice. Recipient shall pay all court costs and attorneys' fees, plus full legal interest on any judgement.

10. Client assumes all liability for shipping of visuals both to and from Impact Visuals Photo & Graphics, Inc. and agrees to pay for any visuals damaged in transit at rates set forth in paragraph 4 above. Impact Visuals strongly recommends that any packages containing originals be shipped by insured carrier to our office address listed below.

Impact Visuals
Photo & Graphics, Inc.
28 West 27 Street, Suite 901, New York, NY 10001 U.S.A.
212-683-9688 **Fax 212-725-8318**

PLAINTIFF'S EXHIBIT 13F

INVOICE

FPG
International

FPG International Group
32 Union Square East
New York, NY 10003-3295
Phone 212 777-4210
Facsimile 212 995-9552

IMPORTANT:

The rights granted above, together with the terms and conditions set forth on the reverse side of this invoice, comprise a binding contract between us.

Your retention of the Photos means you accept all of the terms of this contract including the LIQUIDATED DAMAGES AND ARBITRATION CLAUSES.

CONTRACT FOR THE USE OF PHOTOS

1. Rights Granted: The Photo(s) identified on this Invoice are copyrighted and are protected by the intellectual property laws of the United States and the Berne Convention. **You may not use these Photo(s) in any manner whatsoever until you first pay this Invoice.** By timely paying this Invoice you receive the right to use the invoiced Photo(s) in the United States only, for one year, unless otherwise stated, for the use specified on this Invoice and for not other use. Such license is not assignable or transferable in any way. You agree not to make, authorize or permit **any** use of **any** Photo(s) except as specifically set forth on this Invoice. All rights not specifically granted including, but not limited to, derivative usages, electronic, CD-ROM or promotional rights are reserved for use and disposition by FPG without any limitation whatsoever. Photo usage without FPG's express written authorization is a copyright violation. NOTE: Photo(s) are **not** sold, their **use** is licensed, and they remain the sole and exclusive property of FPG or the individual photographer(s).

2. Unauthorized Use: FPG has calculated the invoiced usage fee(s) by relying in good faith on the information you provided. Since it is difficult to determine damages resulting from unauthorized usage, in the event you utilize a Photo other than as indicated on our Invoice, including but not limited to the number of uses the publication utilized, or the size of reproduction, we agree to forego out right to sue you for copyright infringement and you agree to pay, as liquidated damages, a sum equal to four (4) times the normal price we would have charged for such unauthorized use within ten (10) days of our billing such fee. If you fail to timely make such payment, this liquidated damage provision shall be void and we shall have the right to sue for copyright infringement. Your failure to reject this, of any other provision of this Invoice, in writing within five (5) days of its receipt shall be taken to mean that you accept these terms.

3. Releases: Unless this Invoice indicates that a Photo has a model or property release, you should assume that no such releases exist. You agree to indemnify and hold FPG, and the Photographer, harmless from any and all claims and expenses arising out of the use of any Photo that we did not specifically advise you, in writing, had a model or property release. Under all circumstances, our liability is strictly limited to the invoiced price for the use of the Photo involved. You agree not to use any Photo in a defamatory manner or context, either by physical changes to a Photo or by any accompanying text, and agree to hold FPG, and the Photographer, harmless from any and all claims and expenses arising from a Photo's use. If you utilize a Photo prior to paying our Invoice, we are relieved of any liability for **any** claim concerning such Photo's use or publication since it was published without permission. **Advance written permission is required for use of Photo(s) for sensitive subjects including, but not limited to, contraception, matters of a sexual nature, substance abuse, alcohol, tobacco, AIDS, and physical or mental ailments or abuse.**

4. Return Period: You may retain the Photo(s) invoiced until the date indicated on the reverse of this Invoice. You will be charged a holding fee of One Dollar ($1) per day per Photo until the actual return to and receipt by FPG of all Photo(s) held beyond the stipulated return date. Unless a longer period is granted in writing, holding fees will accrue for a period of nine (9) months from the stipulated return date. Nine (9) months from the stipulated return date, all unreturned Photo(s) shall be deemed to be lost and you shall be billed in accordance with the liquidated damage provision below. This is not a bailment.

5. Cancellation Policy: By issuing you this Invoice we have reserved certain rights for your specific use. Should you decide not to utilize the rights, you must notify us in writing within five (5) days of the date of this Invoice to be eligible for a complete refund. After this five (5) day period, and up

to thirty (30) days after the Invoice date, any cancellation of rights will be subject to a 50% cancellation fee. Thirty (30) days after the date of this Invoice, the invoiced amount must be paid in full.

6. Copyright Protection: Each reproduction of a Photo shall bear a credit line: Photographer name/FPG International Corp. You agree to provide statutory copyright protection of the Photo by timely registering the work you created or the work in which the Photo appears, and such copyright shall be immediately assigned to FPG or the Photographer, upon request and without charge.

7. Payment Terms: No rights are granted until full payment of our Invoice is received. Any disputes you may have concerning the Invoice must be submitted to us, in writing, within ten (10) days of the Invoice date, or you shall be deemed to have accepted this Invoice as issued. This Invoice must be paid within ten (10) days of its date net, without any discounts. You agree to pay FPG a service charge of 2% per month on any unpaid Invoice balance to cover our administrative costs.

8. Accounting for Use: You agree that within three (3) months of the publication of any Photo invoiced, you will send us, without cost, three (3) tear sheets or photographic reproductions of each publication.

9. Responsibility for Loss or Damage: The Photo(s) were inspected prior to shipment and their quantity verified. They were dispatched in perfect condition. You accept all responsibility for loss or damage to the Photo(s) while they are in your possession or in transit, from the time you or your representative, agent or messenger takes possession of the Photo(s) until their safe, undamaged receipt by us. You also assume full liability for your employees, agents, assigns, messengers, freelance researchers and printers for any loss or damage to the Photo(s). By retaining the Photo(s) you assume an insurer's liability for their safe and undamaged return to us and we highly recommend you return them by bonded messenger or registered mail-return receipt requested, fully insured and adequately packaged to obtain a receipt proving redelivery to FPG.

10. Liquidated Damages: We both agree it is difficult to determine in advance th monetary damage FPG and the photographer will suffer due to the loss or damage of an original transparency or historical black and white photo. Accordingly, we both agree that the establishment of a reasonable liquidated value for any lost or damaged original transparency or historical black and white photo is in both of our interests. We both accept the sum of One Thousand Five Hundred Dollars ($1,500.00) as the liquidated value of a lost or damaged original transparency or historical black and white photo. The liquidated value for a duplicate transparency or contemporary black and white photo is agreed to be One Hundred and Fifty Dollars ($150.00). FPG has delivered the Photo(s) to you only upon your express agreement to the terms in this paragraph. **If you do not accept this liquidated damage provision, or the arbitration clause below, please contact us immediately for proper instructions regarding the return of our Photo(s).**

11. Arbitration: A material part of this Contract is this agreement to arbitrate any disputes. Except for issues concerning copyright, any and all disputes relating to this Contract, including its validity, interpretation, performance, breach or other matter shall be settled by arbitration in New York City pursuant to the rules of the American Arbitration Association. Judgment upon any award rendered may be entered in the highest court having jurisdiction, whether Municipal, State, Federal or other, and the interpretation of this Contract shall be governed by the laws of the State of New York. You agree that the arbitrators shall have full authority to award all costs of the arbitration including legal fees, plus legal interest on any award.

12. Legal Costs and Disbursements: In the event that either a court of competent jurisdiction directs us to go to

court or the matter involves copyright, you agree to fully reimburse FPG for its reasonable legal fees and disbursements if FPG is successful in the suit. We both designate the Southern District of New York as the jurisdiction for Federal suits and New York County as the jurisdiction for State suits.

13. No Waiver, Complete Agreement: The terms set forth in our Delivery Contract and Invoice represent our entire understanding concerning the delivery of the Photo(s) to you, and your review and usage thereof. All prior understandings, customs or representations, whether oral or written, are hereby merged in this Contract. No terms or conditions may be added unless made in writing and signed by both of us. No action of ours, other than an express written waiver, may be construed as a waiver of any part of this Contract and no employee is authorized to waive it orally. In the event we waive any specific part of this Contract, it does not mean we waive any other part.

PLAINTIFF'S EXHIBIT 13G

DELIVERY CONTRACT

FPG
International

Exceptional St ck Photography
FPG International Group
32 Union Square East
New York, NY 10003-3295
Phone 212 777-4210
Facsimile 212 995-9652

Consigned To:	DC No	DC Date	Account Executive
	Researchers		Purchase Order
	Deliver Via		Carrier Account

Subject:
Job/Title:

IMPORTANT INFORMATION:

1) This delivery Contract is both a record of the Photos you requested and a binding contract between us. Please read all the terms on the reverse side of this contract and if you do not agree to be bound by such terms, please return our Photos to us immediately. Your retention of the Photos means that you accept all of the terms of this Contract, including the **Review Period, Liquidated Damages, and Arbitration clauses**.

2) We inspect all the Photos before we ship them to you. Please look them over carefully and check that all the Photos listed are included and that they meet your specific

needs. If any have been damaged in shipment, or if there are any discrepancies, contact FPG immediately.

3) Please exercise great care in handling these Photos. All Photos must be returned in the same condition as delivered. They are valuable, and you assume full liability for their damage or loss. The liquidated value of a lost or damaged original transparency or historical black and white photo is $1,500 each. The liquidated value of a duplicate transparency or contemporary black and white photo is $150.00 each.

4) All Photos are copyrighted and you agree not to use them in any manner until you receive and pay our Invoice. Removal of Photos from mounts or reproduction of Photos in any manner whatsoever through the protective sleeves constitutes a billable usage and requires that an Invoice be issued. Please contact your account executive to make necessary arrangements prior to utilizing any Photo.

5) Use of our Photos for sensitive subjects including but not limited to contraception, matters of a sexual nature, substance abuse, alcohol, tobacco, AIDS, and physical or mental ailments or abuse requires advance written permission from FPG.

6) When you have decided which Photos you wish to hold for further consideration or use, please circle their identification numbers on the attached Holding Form, sign and return that form to us with the Photos you no longer need. Please call us if you have any questions. **Thank you for your cooperation.**

TERMS OF DELIVERY

Please note that if you decide to retain our Photo(s) that means you agree to the following terms:

1. Use of Photo(s) The accompanying Photo(s) are copyrighted and are protected by the intellectual property laws of the United States and the Berne Convention. The Photo(s) have been sent to you for inspection only. **You may not use these Photo(s) in any manner whatsoever until after you pay our Invoice.** This means that the Photo(s) may not be copied, scanned, televised, transmitted, electronically stored, or used in layouts, sketches, photostats, mock-ups, etc. until you receive and pay our invoice. Projection of transparencies is specifically prohibited and you are not granted derivative uses of any Photo unless so indicated on the invoice. You may not remove any Photo from its mount or protective sleeve without our specific permission. If you remove a Photo without our prior permission you will be billed an appropriate remount fee, unless the Photo is used for any commercial usage including but not limited to comp, layout or presentation usage. Any commercial usage of a Photo without FPG's express written authorization is considered a copyright violation. Our Invoice will set forth the specific rights granted and other conditions of use, after you advise us of your choice of Photo(s). **ONLY AFTER YOU PAY OUR INVOICE** may you use the Photo(s) and then only in accordance with the Invoice terms.

2. Quantity and Suitability of Photo(s): The Photo(s) listed on the reverse are submitted pursuant to your specific request. You must make the final choice about which Photo(s) are suitable for your particular need. Although FPG tried its best to accurately identify each Photo, FPG cannot be held responsible for incomplete or erroneous captions. Unless we receive a written claim within five (5) days of your receipt of this document you agree that (i) the Photo(s) sent to you are suitable and appropriate as submitted; (ii) the quantity set forth on the reverse is correct; (iii) the captions on the

Photo(s) are accurate; and (iv) the Photo(s) were received in good condition.

3. Review Period: You may examine the accompanying Photo(s) for up to fourteen (14) days after receipt, unless this period is extended in writing. **NOTE THIS IS NOT A BAILMENT.** After this fourteen (14) day period, you will be charged a **HOLDING FEE** of $1 per day per Photo until their actual receipt by FPG. Unless a longer period is granted in writing, holding fees will accrue for nine (9) months from the fourteenth (14th) day after the date of this Delivery Contract, after which unreturned Photo(s) shall be deemed to be lost and you will be billed in accordance with the liquidated damages provisions set forth below.

4. Responsibility for Loss or Damage: The Photo(s) were inspected prior to shipment and their quantity verified. They were dispatched in perfect condition. You accept all responsibility for loss or damage to the Photo(s) while they are in your possession or in transit, from the time you or your representative, agent or messenger takes possession of the Photo(s) until their safe, undamaged receipt by us. You also assume full liability for your employees, agents, assigns, messengers, freelance researchers and printers for any loss or damage to the Photo(s). By retaining the Photo(s) you assume an insurer's liability for their safe and undamaged return to us and we highly recommend you return them by bonded messenger or registered mail-return receipt requested, fully insured and adequately packaged to obtain a receipt proving redelivery to FPG.

5. Liquidated Damages: We both agree it is difficult to determine in advance the monetary damage FPG and the photographer will suffer due to the loss or damage of an original transparency or historical black and white photo. Accordingly, we both agree that the establishment of a reasonable liquidated value for any lost or damaged original transparency or historical black and white photo is in both of our interests. We both accept the sum of One Thousand Five Hundred Dollars ($1,500.00) as the liquidated value of a lost or damaged original transparency or historical black and white photo. The liquidated value for a duplicate transparency or contemporary black and white photo is agreed to be One Hundred and Fifty Dollars ($150.00). FPG has delivered the Photo(s) to you only upon your express agreement to the terms in this paragraph. **If you do not accept this liquidated damage provision, or the arbitration clause below, please contact us immediately for proper instructions regarding the return of our Photo(s).**

6. Releases: Unless this Invoice indicates that a Photo has a model or property release, you should assume that no such releases exist. You agree to indemnify and hold FPG, and the Photographer, harmless from any and all claims and expenses arising out of the use of any Photo that we did not specifically advise you, in writing, had a model or property release. Under all circumstances, our liability is strictly limited to the invoiced price for the use of the Photo involved. You agree not to use any Photo in a defamatory manner or context, either by physical changes to a Photo or by any accompanying text, and agree to hold FPG, and the Photographer, harmless from any and all claims and expenses arising from a Photo's use. If you utilize a Photo prior to paying our Invoice, we are relieved of **any** liability for **any** claim concerning such Photo's use or publication since it was published without permission. **Advance written permission is required for use of Photo(s) for sensitive subjects including, but not limited to, contraception, matters of a sexual nature, substance abuse, alcohol, tobacco, AIDS, and physical or mental ailments or abuse.**

7. Copyright Protection: Each reproduction of a Photo shall bear a credit line: Photographer name/FPG International Corp. You agree to provide statutory copyright protection of the Photo by timely registering the work you created or the work in which the Photo appears, and such copyright shall be immediately assigned to FPG or the Photographer, upon request and without change.

8. Unauthorized Use: FPG will calculate a usage fee for Photo(s) by relying in good faith on the information you provide and will issue an invoice granting reproduction rights and detailing the usage granted. Since it is difficult to determine damages resulting from unauthorized usage, in the event you utilize a Photo other than for the usage indicated on our Invoice, including but not limited to the number of uses, the publication utilized, or the size of reproduction, we agree to forego our right to sue you for copyright infringement and you agree to pay, as liquidated damages, a sum equal to four (4) times the normal price we would have charged for such unauthorized use within ten (10) days of our billing such fee. If you fail to timely make such payment, this liquidated damage provision shall be void and we shall have the right to sue for copyright infringement.

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Title: Royalties

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PLAINTIFF'S EXHIBIT 31

Below is a list of subject matter depicted in the 310 (three hundred and ten) lost slides, identified by country and divided into categories. As per request, time, location and incidents depicted are described. Also as per request, "Risk Level of Death or Bodily Injury" is indicated according to the following scale:

@ — Risk level moderate, e.g. potential injury while covering a large crowd or political demonstration.

+ — Risk level high, e.g. in a war zone, but not during battle.

++ — Risk level very high, e.g. in a war zone, travelling on roads where danger of land mine explosion, ambush or attack was high.

+++ — Risk level extreme, in active combat zone, under fire, where possibility of death or serious bodily harm was constant.

I. Nicaragua

A. Military/Combat Slides

Sandinista Army:

Number	*Risk Level*	*Details of Location/Date/Subject*
(7)	++	Series of Sandinista Army Unit on patrol and in base camp in mountain war zone, June 1985; "Making V for Victory" sign.
(2)	+++	Other soldiers on guard in small hamlet of Teocasinte, within sight of Honduran hills, after numerous shelling attacks launched by Contras from Honduras, May 1984. Soldiers standing near gate; trench surrounded by sandbags.

Number	*Risk Level*	*Details of Location/Date/Subject*
(2)	++	Soldiers near rural farm cooperative, Chontales, after Contra attack, September 1984. Farmhouse lying in ruins, with roof blown off, walls collapsing.
(2)	@	Wounded soldiers and civilians after week-long series of battle with Contras near Esteli and La Trinidad, in Esteli Hospital, April 1985.
(2)	+	Soldiers on guard after another Contra attack, this time on an electrical power installation near Condega, North-Central Nicaragua, 1986. Twisted, blackened rubble, graffiti on wall.
(4)	++	Soldiers in central Nicaragua searching for "Contras" in April 1986. Troops walking single-file through rolling hills, resting near farmhouse, in camp, digging trenches.
(6)	+++	Series taken while on army-escorted trip into northern mountains to the scene of a land mine explosion laid by Contras which killed 34 civilians near San Jose De Bocay, July 4, 1986. Shot of vehicles in long convoy; jeep stuck in mud crossing river; two shots of dead bodies lying in open coffins; two shots at graveside service of coffins in mass grave and grieving relatives.
(2)	++	Army unit in Chontales province during historic peace negotiations, April 1990. Guard post at bridge in remote area; hiking on patrol.

Number	*Risk Level*	*Details of Location/Date/Subject*
(2)	++	Soldiers in Matagalpa Province during peace negotiations, April/May 1990. Hiking near road outside area designated "Save Haven" for contras; on security detail.
	"Contra" Rebels:	
(6)	@	Week long series of attacks by Contras on Esteli and La Trinidad, Central Nicaragua, April 1985. Captured Contras sitting in Municipal Hall, out on balcony facing angry crowd, individual rebels looking dejected, terrified. (3)
(9)	+	Aftermath and damages from above attacks, April 1985. Hole in army truck windshield, holes blown in bridge by Contras, child near army truck, soldier holding grenade, refugee children in nearby camp, health clinic mortared, burned bus near Panamerican Highway.
(5)	+++	Contras on Nicaraguan/Costa Rican border holding "Witness for Peace" group and 15 journalists (including plaintiff) as hostages pursuant to orders from famed, top rebel commander Eden Pastora. Held hostage at gunpoint for 30-hour period (overnight), as Nicaraguan government forces flew helicopter search patrols nearby, August 1985. Scenes include: Contras leading "Witness" people off of boat at gunpoint, walking through forest with armed Contras keeping

Number	*Risk Level*	*Details of Location/Date/Subject*
		watch and prodding people along; Contras standing guard at remote farmhouse, in highly nervous state (often threatening language, etc.)
(2)	+++	Scenes in and near small farmhouse where plaintiff and other captives were held; peasant woman cooking food for plaintiff and other hostages; various dramatic shots of "Witness" members in state of fear due to life-threatening situation.
(2)	+++	Scenes on boat hostages had taken down San Juan River, including Contras on board. Shot of group en route downriver after release of plaintiff and other captives on the day of their release.
(10)	@	Scenes from various funerals for victims of Contra attacks; Matagalpa, April 1985; Nicaraguan President Daniel Ortega comforting relatives; in Somoto, near Honduran boarder, May 1985; funeral procession in San Juan De Limay, South-Central Nicaragua, May 1986; series from funerals in Esteli, April 1985, in street procession and at cemetery.
(4)	++	Contra soldiers in Matagalpa Province during peace negotiations, April 1990. Group on patrol near road; in temporary camp and outside farmhouse; leader in Beret talking to journalists as his men stand guard behind.

Number	*Risk Level*	*Details of Location/Date/Subject*
(5)	+++	Contras in Chontales Province, also during historic peace process, May 1990. Slides taken for this series obtained in exclusive encounter with leader of a renegade group which objected to the negotiations then underway to end the war. This rare meeting posed special risk as this particular Contra command was known for its aggressiveness and violence and was hostile to plaintiff and journalists from Wall Street Journal who were present in meeting. Contras on patrol; in camp; standing guard at dusk; hostile rebel commander "El Chaparro" as he explained his rejection on peace plan; two young boys kidnapped by Contras to carry food supplies, subsequently released (and encountered later at their home where plaintiff and Wall Street Journal reporters interviewed them).
(5)	++	Contras in two of their remote, closely guarded base camps in Honduras, April 1990. Scene of about 400 rebels raising rifles overhead as they listened to then-commander Enrique Bermudez (later assassinated) explain details of the peace plan. Civilian supporters in nearby camp of small tin-roofed shacks; visiting with rebels themselves.

Number	*Risk Level*	*Details of Location/Date/Subject*
(2)	@	Contras speaking to crowd after defecting from rebel ranks under amnesty, May 1986; poster offering that amnesty.
		Atlantic Coast Region:
		(Home to various indigenous groups, in particular "Miskito" and "Sumu" Indians, who formed their own rebel group for several years).
(3)	++	Series documenting the return of Sumu Elder Ronas Dolores to his village deep in jungle interior, May 1984. Scenes of him speaking to assembled villagers; rural wooden huts; early morning fog surrounding tree; chopping wood in village clearing.
(6)	+	Miskito refugees on both sides of Honduran-Nicaraguan Boarder, November 1984. View of "Tasba Pri" settlement camp; hundreds of people in camps in Honduras; view from the air of Coco River; airstrip near a town on Honduran side; people building houses in jungle camp; cooking food in same locale.
(14)	+++	Series documenting the famous May 1985 return of Miskito Indian refugees to their villages along the Coco River which forms the border between Nicaragua and Honduras. The refugees were going home after having been forced to flee fighting along the river which had destroyed their villages in 1982. Photographer for National

Number	*Risk Level*	*Details of Location/Date/Subject*
		Geographic and plaintiff were the first foreign journalists to reach the river area, which had long been abandoned due to minefields and the danger of possible new combat. Prior to this time, local authorities prevented any outsiders from travelling to the river. Plaintiff and National Geographic photographer were only allowed access to this remote area after two days of negotiation, and while accompanied by local Miskito "Elder" Rafael Dixon and a Moravian Church Pastor, both of whom provided security against possible kidnap or attack by still-active Contras.
		This "Return To The River" is contained in a final video and includes: People and belongings piled high on trucks; various shots en route; crater in road left by land mine explosion; convoy proceeding through forest and into clearing of first village (called "Ulwas") to be resettled; unloading building supplies and belongings; remains of burned-out homes; children looking bewildered; rundown church, spared destruction because it was a church.
(2)	@	Other Atlantic coast scenes, including: repairing houses near beach-front village, July 1986; cutting coconuts; scaling tree to get breadfruit; street scenes in bluefields; hunting out in the bush, 1988.

Number	*Risk Level*	*Details of Location/Date/Subject*
(3)	@	Aftermath of hurricane "Joan," November 1988, showing severe damage to houses and buildings in Bluefields; people trying to clear debris from city streets; scraping mud from floor of house; submerged village of RAMA, as seen from helicopter overhead.
(2)	@	Street senses in Puerto Cabezas, largest town on Nicaragua's northern coast, showing the main cinema, town square, old wooden houses, seacoast dock, one and only traffic light.
		B. General Scenes:
(14)	@	Views of historic Sandinista rallies in Managua's "Revolution Square"; February and November, 1984; June 1986; April, 1988; January, 1990. Crowds waving Sandinista flags; huge portraits of Augusto Sandino and Sandinista party founder Carlos Fonesca on National Palace; all nine top Sandinista Commanders (The National Directorate) sitting on stage; Daniel Ortega addressing crowd; Tomas Borge speaking at smaller rally in another square.
(14)	@	Close-up portraits of rural campesinos; landscape shots including volcanoes; farming pastoral scenes, such as picking cotton, coffee; man at irrigation rig; wagon in sunset; industrial factories and workers; people engaged in daily tasks such as plowing, cooking, fishing. These serve to illustrate the

Number	*Risk Level*	*Details of Location/Date/Subject*
		beauty and vitality of Nicaragua's people, set to the backdrop of the drama of the bloody war engulfing them.
(10)	@	Photos to illustrate difficulties with daily life caused primarily by the war. Digging trenches, November 1984; people piled onto roof and hanging out of overcrowded buses; scenes of poverty in slums of Managua, Leon, and Chinadega cities.
(4)	@	The "Cuban" angle: Fidel Castro inaugurating huge sugarmill complex built by Cuba north of Managua, November 1984; Cuban military advisers during ceremony just before their departure for home, June 1986.
(7)	@	Culture/Sports scenes: People in costume during Regional Dance Festival; shots during holy week "Passion Play," April 1984; baseball team celebrating victory in Managua Sports Stadium after Nicaraguan "World Series", April 1985; policeman singing, May 1984.

(158) — Total Nicaraguan section

		II. El Salvador
		A. Military/War Scenes.
(3)	+	Army soldiers on guard in San Francisco Gotera, Morazan, after March 1984 elections. In town near main headquarters; talking with commanding colonel; interrogating young boy who'd been with guerrillas.

Number	*Risk Level*	*Details of Location/Date/Subject*
(3)	++	Soldiers on duty in Chalatenango, northern town near war zone, March 1985; checking documents of people asked to get off bus, March 1984.
(6)	+++	On patrol with army in Morazan Province, May 1989. Hiking in single-file; in camp; cooking; uncovering guerrilla-laid booby trap (small hole for homemade landmine).
B.	Guerrillas	
(6)	+++	In rebel-held zone near Guazapa volcano north of San Salvador, March 1985, Guerrillas walking off with food supplies, out on patrol, young guerrilla being interviewed by plaintiff's colleague.
(4)	+++	Aftermath of battle scenes, also during November 1989 San Salvador offensive; charred, dead bodies lying by street corner; bombed-out house; dead guerrillas lying in neighborhood retaken by army; street scenes showing debris and burned-out vehicles.
(5)	++	Aftermath of guerrilla attacks in Morazan, April 1985. Burned-out buildings; graffiti and old lady.
(6)	++	Refugees in camp, Morazan (April 1985) and in San Salvador (April 1985). Children weaving rope amid signs of poverty-stricken despair, filthy stacks, guards watching over camp.

Number	*Risk Level*	*Details of Location/Date/Subject*
(4)	+++	Young guerrillas in town of Tenancingo, El Salvador, March 1985. Standing by road at car in destroyed town square.
(4)	+++	Aftermath of bombing in same guerrilla-held zones, March 1985. Car in which plaintiff was riding came under aerial bombardment from government helicopters. Several colleagues and plaintiff, in danger of serious bodily injury or death, forced to seek emergency cover in roadside ditch. Some of the slides depicted brush fires set by the rockets fired at plaintiff and his colleagues form overhead.
(9)	+++	Slides taken during three incidents in the November 1989 rebel offensive in San Salvador, which presented the most dangerous circumstances plaintiff encountered anywhere. In one instance, plaintiff crept inside the Sheraton Hotel while it was under the control of Guerrillas, in order to interview American Green Berets trapped inside. Another time, army solders were forced to beat a hasty retreat from a market neighborhood as guerrillas suddenly advanced; a "Green Cross" aid vehicle in which plaintiff was riding while photographing was moved back from the line of fire in emergency measure. British colleague shot and killed while standing just a few feet away from plaintiff. Nine (9) slides taken during

Number	*Risk Level*	*Details of Location/Date/Subject*
		these incidents are among those given to defendant: Bombed-out cars used as debris to form a roadblock; civilian refugees streaming out of embattled neighborhoods waving white flags; soldiers taking cover behind trees and building as rebels advance: "Green Cross" workers trying to reach people wounded in a battle zone; a dead body lying in a ditch; guerrillas wearing masked bandannas standing guard inside Sheraton Hotel after army encircled the building, leading to a stand-off; living room of fancy mansion which guerrillas had entered to take cover and treat wounded (blood and gauze bandages on coach); two scenes of helicopter flying overhead as they fired sophisticated "Gatling" guns at the area near the Sheraton Hotel.
	C. General	
(6)	@	"People" shots, including "Girl At The Well", used in 1984 San Francisco Exhibition.
(6)	@	Tomb of Murdered Archbishop Oscar Romero in San Salvador Church, April 1984, church marchers, April 1984.
(62)		**Total El Salvador section**

III. Military and General

Number	*Risk Level*	*Details of Location/Date/Subject*
(5)	@	At camp for U.S. National Guardsmen in training with Hondurans, April 1985. Soldiers in camp, setting up tents, chow line, building jungle road.
(5)	@	Military exercises near Nicaraguan border, May 1985. Tanks, planes, officer observing with binoculars; Honduran commanders with U.S. General passing in review.
(1)	+	Children watch helicopter take off, May 1985.
(2)	@	Landscape scenes, including on offshore islands in Gulf of Fonseca, such as "Isla De Tigre" where U.S. had mountaintop military base.
(2)	@	City scenes in Tegucigalpa, Honduran capital, 1986.
(2)	@	Shots of Mayan ruins at Copan, ancient "Stelae" and small temple pyramids, 1990.
(17)		**(Total Honduras Section)**

IV. Costa Rica

A. General (other than International Summit Meetings)

Number	*Risk Level*	*Details of Location/Date/Subject*
(1)	@	Child holding "Peace Dove" during street march in capital San Jose, April 1984.
(2)	@	Scenes of natural beauty, in tropical rain forest and of a towering volcano, 1988.

(3) (Total Costa Rica Section)

IV. Guatemala

A. General (other than at International Summit Meetings)

(5)	@	Scenes of Natural Beauty: Volcanoes, Mountain Lakes, twisting mountain roads, foggy morning; 1984, 1986, 1988.
(5)	@	Scenes to illustrate rich indigenous cultures: Women and men in multi-colored clothing, and ancient Mayan religious ceremony on steps of church in Chichicastenango, Central Highlands; April 1986.
(5)	@	Colorful religious street processions, particularly during holy week celebrations in Antigua Guatemala and nearby village, April 1990; army patrol near Antigua, also April 1990.
(6)	++	Series taken in northern conflict zone, especially in the infamous "IXIL Triangle," several villages where army repression against villagers had been

Number	*Risk Level*	*Details of Location/Date/Subject*
		fierce on suspicion of their assisting guerrilla groups. Scenes of: women in colorful dresses, selling in the market, widows who lost their husbands in early 1980's and who had formed special farm cooperative working in fields, children playing in fields and on shore of lake; 1986, 1988.

(21) (Total Guatemala section)

VI. Panama

A. Military/War Scenes

(5)	++	U.S. soldiers on patrol in Panama City, after December 1989 invasion. Searching for looted items in devastated store and private apartment where electronic goods were recovered; riding on "Humver" armored vehicle; makeshift refugee camp in stadium; in bombed-out former headquarters of Noriega's defense forces.

B. May 1989 Election

(5)	++	Noriega "Good Squads" threatening opposition candidates Guillermo Endara, Richard Arias, "Billy" Ford: All three riding in back of campaign truck; soldier firing pistol into air; crowds demonstrate in street; candidates speak at campaign rally.

(10) (Total Panama section)

VII. General, All Countries

Heads of state of Central American Countries, taken during individual appearances and at periodic Summit meetings throughout the late 1980's as internationally mediated negotiations to resolve the different regional conflicts took place. They include:

Number	*Risk Level*	*Details of Location/Date/Subject*
(3)	@	Oscar Arias, former Costa Rican President and Nobel Peace Prize Laureate, author of "Arias Peace Plan," taken during February 1986 election campaign and May 1986 inauguration, (2).
(2)	@	Daniel Ortega, former President of Nicaragua; shots of him taken during Summits, including one of Regional Leaders attended by former U.S. President George Bush in Costa Rica.
(2)	@	President Daniel Ortega during historic February 1990 election campaign.
(3)	@	Series taken during 1984 visit to Managua neighborhood during 1984 campaign; speaking during "Face The People" event; visiting school.
(2)	@	Violeta Chamorro, current President of Nicaraguan, during 1990 election campaign. Dramatic frontal shots as she waived to crowd, back shot from behind as she faced crowd.

Number	*Risk Level*	*Details of Location/Date/Subject*
(2)	@	President Violeta Chamorro, taken during first meeting with former "Contra" leaders as she persuaded them to disarm under United Nations supervision, May 1990. One exclusive photo showed her embracing the main ex-contra leader known as "Franklin"; who later died in an accident.
(2)	@	Manuel Antonio Noriega, former leader of Panama, during May 1989 election campaign he later annulled; shot of him walking through crowd, another while watching anti-U.S. Drama performance after May 1989 elections.
(3)	@	Jose Napoleon Duarte, former President of El Salvador, who has since died; Alfredo Cristiani, Duarte's successor and still President of El Salvador.
(3)	@	George Bush, both when he was President and Vice-President of the United States, on visits to the region (Costa Rica), May 1986; Arias inauguration and April 1990 Regional Summit.
(2)	@	Former Guatemalan President Vincicio Cerezo, who had the original idea to hold Regional Summit Meetings to seek peace in Central America. At time of February 1986 election; at May 1986 Summit.
(2)	@	Shots of all 5 Central American leaders at International Summit in Esquip-

Number	*Risk Level*	*Details of Location/Date/Subject*
		ulas, Guatemala, May 1986. Inside old church, during press conference and while signing agreement.
(2)	@	Shots of all 5 Central American leaders at Summit in San Jose, Costa Rica, February 1998. At press conference and while signing final document.
(1)	@	Shots of all 5 Central American leaders at Summit in Montelimar, Nicaragua, April 1990. Walking along beach, and at final press conference signing final communique.

(29) (Total General Section)

(300) (Total Slides included in original group)

Additional Slides:

Ten (10) additional transparencies were delivered to Guidance Associates in late spring 1991 by Charlotte C. Gasperini, at the request of William Goodman, President of Guidance Associates. These transparencies were also never returned to plaintiff. These transparencies were used in an advertising catalogue for the video, produced by defendant and made with plaintiff's slides. The images were general scenes such as portrait "People" shots, several landscapes, and then five slides of military personnel (soldiers) and "action" scenes.

INTERROGATORY 40:

For each of the Three Hundred and Ten (310) slide transparencies as referred to in paragraph 9 of plaintiff's amended complaint, state what camera equipment, lenses, filters, lighting equipment or other technical or optical equipment was used.

Answer to Interrogatory No. 40:

All slides were taken with the following camera equipment:

Lenses: — two Nikon Fe's;
— two Nikon FE2;
— one Nikon FM2.

Lenses: two Nikon 50mm lenses;
two (Nikon & Tamron) telephoto zoom lenses, 35-21 mm, and 35-200mm);
two Nikon wideangle lenses, 24mm and 28mm;

No. 95-719

(7)

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Should a federal appellate court exercising diversity jurisdiction apply a federal or state standard of review to the appeal of a district court's denial of a Rule 59 motion to set aside a jury award as excessive?

2. Absent trial error, does the Seventh Amendment's "reexamination clause" permit federal appellate review of facts found by a jury?

3. If federal appellate review of jury fact findings is permitted at all by the Seventh Amendment, what is the standard of review?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption on the cover of this brief.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit reversing the District Court (Pet. App. 1a-10a) is reported at 66 F.3d 427. The order of the United States District Court for the Southern District of New York denying defendant's motion under Fed. R. Civ. P. 59 to set aside the jury's verdict and order a new trial (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 12, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on November 3, 1995, and was granted on January 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in pertinent part:

> [N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

CBS News correspondent William Gasperini commenced this diversity action in the United States District Court for the Southern

District of New York against the Center for Humanities, Inc. (the "Center"), because the Center lost 300 of Mr. Gasperini's original and irreplaceable slide transparencies.

The Center approached Mr. Gasperini to use his slides for a video it was producing entitled *Conflict in Central America*. App. 46, 50. Mr. Gasperini's photographs were solicited because he was the only photographer the Center knew who had a body of work on war in Central America. App. 50. After being contacted by the Center, Mr. Gasperini delivered 300[1] original, irreplaceable slide transparencies which the Center used to make the video. App. 61, 68, 196. After the Center made the video, it lost the transparencies. App. 60-61.

The lost transparencies represented the culmination of Mr. Gasperini's work on Central America, collected over a seven-year period and covering many of the critical events in Central American history during that period. App. 172-73. Many of the photographs were taken at great risk of bodily injury and death. App. 163-68. Others were taken in remote regions of the Central American jungle and mountains. App. 169-73. All of the photographs depicted images and scenes impossible to recreate.[2] App. 177.

After trial began, the district judge granted Mr. Gasperini's motion for a directed verdict on the issue of liability. The only issue submitted to the jury was an assessment of damages. App. 48, 60-61. The trial lasted three days. In addition to factual and expert testimony from eight witnesses, significant visual exhibits

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[1] After Mr. Gasperini's delivery of these 300 slides, his mother delivered an another ten slides to the Center. App. 196. Apparently, because these slides were not professionally edited, the jury did not award damages for their loss.

[2] Examples of the 300 lost transparencies included photographs taken by Mr. Gasperini while he was held hostage by guerilla fighters in the Nicaraguan jungle, App. 164-69, and while he was under fire from helicopter gunships in El Salvador, App. 167. They included photographs of major historical figures, App. 162, as well as scenes depicting the aftermath of war. App. 163-165.

and documentary evidence were admitted and reviewed by the jury and judge during the course of trial.

1. The Evidence At Trial

At trial, the jury and judge heard extensive testimony regarding Mr. Gasperini's background, training and experience as a foreign correspondent and photojournalist. In addition to work with CBS News and the Christian Science Monitor, Mr. Gasperini has worked for a variety of other major media, including United Press International, the Canadian Broadcasting Corporation, Reuters, the Oakland Tribune and the Kansas City Star. App. 137.

Mr. Gasperini has traveled the world as a foreign correspondent and photojournalist, having taken photographs on every continent, save Australia and Antarctica. He speaks Portuguese, French, Russian, English and Spanish. App. 139. Most of his career has been spent in Central America. App. 172. His photographs have been used in newspapers, magazines, films, professional slide presentations and in multi-media projects such as CD-ROM. App. 146-48. Some of his lost work from Central America previously had been displayed in galleries. App. 200.

Mr. Gasperini earned approximately $10,000 from photography while in Central America. App. 178, 181-82, 192, 194-95. He explained, however, that during his time there he was collecting photographic material, rather than attempting to market it extensively. App. 150-51. Mr. Gasperini testified about his plans to publish a book containing his best photographs from Central America, and to place them with a stock agency for marketing. App. 175. Mr. Gasperini's plans concerning his book were confirmed by respondent's expert. App. 272.

The jury was also presented with extensive evidence demonstrating the superior quality of Mr. Gasperini's photographs, his technical excellence as a photojournalist and the uniqueness of the images he captured. William Kuebler, an award winning photographer and a photo editor for Gannett Newspapers ("Gannett"), testified that Mr. Gasperini was "an excellent photographer" whose

photographs were "every bit as good, if not better, than the photographs that we've taken [at Gannett]." App. 208. Mr. Kuebler has worked with hundreds of photographers in his career and had a 25-year history of familiarity with Mr. Gasperini's work. App. 207-208. In support of his opinion regarding Mr. Gasperini's work, Mr. Kuebler discussed Mr. Gasperini's selective eye as a photographer, the composition and subject matter of Mr. Gasperini's photographs and the access Mr. Gasperini obtained to dangerous or remote areas, which produced unique photographs. App. 208-209.

Mr. Kuebler's testimony on the quality of Mr. Gasperini's work was amply supported by other witnesses. Jane Kinne, Mr. Gasperini's principal expert on valuation, described Mr. Gasperini as a "first class professional photojournalist." App. 216. Susan Green, a consultant of the Center and producer of *Conflict in Central America,* the video produced from Mr. Gasperini's photographs, described his lost photographs as "wonderful." App. 65. Even respondent's President, William Goodman, testified that he was "quite pleased" with the quality of Mr. Gasperini's photographs. App. 122.

The jury was also presented with substantial visual exhibits and documentary evidence. First, the jury was provided with a meticulous description -- in writing, augmented by Mr. Gasperini's testimony -- of the content of each of the 300 lost photographs and the circumstances under which each was taken. Pl. Ex. 31; App. 203, 204; 427-445. Second, the jury saw visual exemplars of Mr. Gasperini's work from remote regions of Tibet, Nepal, India, Pakistan, Sri Lanka, the Gulf War and the Soviet Union so that the jury could further assess the quality of his work and his technical expertise as a photojournalist. Pl. Ex. 18; App. 153-157. Finally, the jury saw *Conflict in Central America,* the video produced by the Center which contained 110 of the 300 photographs lost by the Center. Pl. Ex. 10; App. 46-47.

Jane Kinne, a national expert in valuing photography who has appraised photography for estates, museums, art galleries, universities and Sotheby's, Inc., provided extensive, detailed

testimony explaining how the valuation of lost photography is done in general and how she valued Mr. Gasperini's work.[3] She explained how a photograph is made and the distinction between a photographer and a photojournalist. App. 217-218. She described how knowledge of a region, its culture, history and language bear directly on the photographer's ability to obtain unique images. App. 217. She described the critical process of editing, App. 218, 219, and how she tested Mr. Gasperini's photo editing skills. App. 216, 227-28. She explained the criteria to determine the value of original color transparencies,[4] App. 227, and how photographs generate income for the photographer and his estate over the lifetime of the copyright. App. 228-29. On cross-examination, she testified that Mr. Gasperini's work had future value in the editorial market and the more lucrative advertising market. App. 236, 243. Finally, she testified that there was a continuing demand for photographs on Central America. App. 239. Based on review of all information available to her, Ms. Kinne placed an average value of $1500 each for the lost transparencies. App. 228.

Ms. Kinne's testimony was supported by Robert Zentmeier, a witness on market value who was subpoenaed at trial by Mr. Gasperini. Mr. Zentmeier is the president of Photo Researchers, a major photo stock agency which maintains an inventory of approximately one million slides. App. 70. Mr. Zentmeier

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[3] Ms. Kinne's other credentials include: a Master's degree from Columbia University in audiovisual education; 47 years in the photographic industry; 30 years at Photo Researchers, one of the largest stock agencies in the world, including 12 years as its president; president of the American Society of Picture Professionals (ASPP); 30 years as a sustaining member of the American Society of Magazine Photographers (ASMP); and a member of the legal and evaluation committees of ASPP and ASMP. App. 211-215.

[4] As Ms. Kinne explained, the criteria for valuing photographs involves, *inter alia*, the technical excellence of the photograph, aesthetic value (or the particular eye of the photographer), the subject matter, the value of the subject matter, the way the subject matter has been treated and the value of a particular photograph in relation to a whole body of work, particularly in the case of photojournalism where the photojournalist is trying to tell an entire story through the use of an image. App. 227.

testified that: (i) the sales potential of a photograph does not diminish with the death of the photographer, *id.*; (ii) fees for the use of an image can be as high as $30,000, App. 73; (iii) historic photographs remain in stock indefinitely and their use recurs often after many years, App. 75-76; (iv) repeated use is common in the industry, *id.*; and (v) prior sales history of a photographer does not affect the reproduction fee. App. 76-77. Thus, both Ms. Kinne and Mr. Zentmeier established that fees for the one time use of a single transparency could be as high as tens of thousands of dollars. App. 73, 228. As Ms. Kinne explained, after multiplying those fees through "the life of the copyright, . . . the $1500 becomes a very fair and reasonable figure." *Id.*

The Center called only one witness at trial, Gideon De Margitay. Mr. De Margitay described himself as a "buyer of photography" and did not have Ms. Kinne's background in appraisal or valuation of photographic material.[5] App. 268, 270. Mr. De Margitay stated that if he were putting together a book on Central America, he would have selected 47 of the 300 lost photographs because the others would have been of "no particular interest" to him. App. 257-58. Ultimately Mr. De Margitay could not place a value on all of the lost photographs, App. 260, but stated that he would pay up to $250 for the single use of each of those that were of interest to him. App. 258.

Significantly, Mr. De Margitay conceded a number of points that supported the testimony of Mr. Gasperini's witnesses: (i) a photographic image generates income over the owner's lifetime and fifty years beyond and consequently Mr. Gasperini's pictures would have earning power over the next 94 years, App. 268-69; (ii) demand for historical photographs recurs over time, App. 271; and (iii) historical photographs can be used in many different contexts including use in textbooks, educational videos, magazines and books. *Id.*

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[5] Mr. De Margitay did not belong to any professional photographic organization, nor sit on any committees for valuation. His experience was in production, and he worked as a consultant, primarily for Time, Inc. App. 249, 262.

2. The Jury Charge And Verdict

The Honorable Charles L. Brieant instructed the jury that in assessing the value of Mr. Gasperini's work, they should consider: "the ability and experience and knowledge of the photographer," the "reputation of the photographer or photojournalist," the "content and subject matter of the lost slides," the "extent and nature of the demand in the market for the use of pictures of this particular type and content," the "prior licensing fees collected and the prior experience of the [photographer] in connection with his slides," the "extent and nature of his efforts to exploit the economic value of [the] transparencies" the "potential competition or alternative sources of similar or substitute photography," the "potential use of the slides for the purposes of writing a book," and "the value of the slides . . . over the life of the copyright." App. 304-306.

After the evidence was submitted and following the trial judge's charge, the jury deliberated and returned a verdict awarding Mr. Gasperini $450,000. App. 313.

3. The Denial Of Respondent's Rule 59 Motion

After the verdict, the Center moved for a new trial pursuant to Fed. R. Civ. P. 59(a), arguing that Judge Brieant erred in admitting certain evidence, and that the jury's award was excessive. After briefing, Judge Brieant, who presided over the case from its inception, denied the motion. Pet. App. 11a-12a.

4. The Second Circuit's Decision

Following denial of the Rule 59 motion, the Center appealed to the Court of Appeals for the Second Circuit. The Second Circuit expressly rejected the Center's argument that evidence about the industry standard was admitted erroneously. Pet. App. 4a-5a. Moreover, the Second Circuit made no finding that Judge Brieant had erred in instructing the jury, nor that the jury was influenced by passion or prejudice, nor that the trial proceedings were defective in any other respect. Nevertheless, the Second Circuit overturned the jury's verdict as excessive, and ordered a new trial

unless Mr. Gasperini would remit all but $100,000 in damages. Pet. App. 9a.

Remarkably, the Second Circuit held that, in a diversity action, not only does state substantive law apply, but state law also provides the appellate standard for reviewing the jury's findings of fact. Pet. App. 8a. Under the New York State standard of review, the Appellate Division -- which is empowered to make *de novo* findings of fact -- "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *cited in* Pet. App. 8a. The Second Circuit conceded "[t]his standard accords less deference to the jury's award than does the traditional [federal] standard," which it described as a "shock the conscience" standard. *Id.*

Thus, apparently viewing itself as unbound by the Seventh Amendment or what it perceived as the federal standard, the Second Circuit proceeded to recharacterize and re-weigh the evidence presented to the jury. Its first step was to jettison without explanation almost all the factors the jury had been instructed to consider in determining damages, announcing that damages would be based instead only on "uniqueness"[6] and "the earning level of the photographer." Pet. App. 4a. Moreover, in a glaring omission, the Court of Appeals stated that the jury was not "able to see the lost transparencies themselves," Pet. App. 9a, without mentioning that the jury had seen a videotape reproduction of 110 of the transparencies. It was only the appellate panel -- not the jury or Judge Brieant -- who had taken it upon themselves to value the transparencies without ever seeing any reproductions of them. Having mischaracterized both the jury's instructions and the

[6] The Court of Appeals defined "uniqueness" so as to turn almost entirely on whether other photographers were present when a photograph was taken. Its opinion mentions, as an abstract "proposition," that different photographers' skills may lead to "some variation in photographs of a single event," Pet. App. 5a, but never mentions that the jury was specifically instructed to evaluate the "ability and experience and knowledge of the photographer," App. 305, and received ample testimony and visual evidence with which to make that evaluation.

evidence, the appellate panel very briefly considered one part of Ms. Kinne's testimony, found themselves unpersuaded by it, Pet. App. 6a, and without further reference to any part of the record "found" that the majority of the lost transparencies were worth no more than $100 each. Pet. App. 9a. Having thus reexamined the jury's fact-findings, the Court of Appeals assessed the damages to be less than one quarter of the original jury award. *Id.*

SUMMARY OF ARGUMENT

For the Court of Appeals to apply a state standard of review to the jury's findings of fact on damages in a diversity case, it needed to ignore the plain language of the Seventh Amendment's reexamination clause, the Amendment's history, the well-documented common law practice at the time the Amendment was adopted, and two lines of this Court's precedents: one line, never repudiated by the Court, flatly prohibiting appellate review of the jury's findings of fact on damages; the other, most recently reaffirmed by a unanimous Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79 (1989), holding that federal, not state, standards of review apply in diversity cases.

One need look no further than this Court's recent precedents to see that the issue raised by the Second Circuit's opinion already has been decided by this Court several times, most recently in *Browning-Ferris*: the Seventh Amendment and fundamental federal policy require that federal courts sitting in diversity apply federal law on the division of fact-finding responsibility among the jury, district judge and appellate court. *See, e.g., Browning-Ferris*, 492 U.S. at 278-79; *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538-39 (1958).

A re-reading of *Browning-Ferris* alone is sufficient to establish the Court of Appeals' error in this case. However, to appreciate the magnitude of that error and establish meaningful guidelines for the future, one must look to the Seventh Amendment and the common law tradition embodied therein.

As the vigorous public debates surrounding the passage of the Seventh Amendment reveal, the Amendment's reexamination clause, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," U.S. Const. amend. VII, was specifically intended to preclude the exercise of appellate review over issues of fact decided by a jury, in the absence of trial error. By adverting to the "rules of the common law," the Seventh Amendment was understood to refer to the well-known English common law procedure for appellate review, the writ of error, by which only questions of law -- and not issues of fact -- could be reviewed in the appellate courts.

The American practice at the time of the Seventh Amendment's passage, and in the years following, was consistent with English common law and the purpose of the Seventh Amendment. Indeed, the Judiciary Act of 1789, enacted one day before the Seventh Amendment was sent to the States for ratification, set the practice in the federal courts by restricting appellate review to the common law writ of error. Challenges to a jury's verdict based on the weight of the evidence, and claims that damages were excessive, were restricted to the trial court. And as this Court held in our early history, and repeatedly reaffirmed thereafter, the denial of a motion for a new trial, in the absence of trial error, was unreviewable on appeal.

Federal appellate court reexamination of the jury's findings of fact on damages, absent trial error, is unconstitutional; it is also unnecessary for meaningful judicial review of juries' damage awards. The District Court retains authority to review the award for excessiveness or inadequacy, and to award remittitur where appropriate; the Court of Appeals may review for any legal error, including sufficiency of the evidence to support a trial judge's denial of a motion for judgment as a matter of law.

Assuming *arguendo* that some form of appellate review of jury fact-finding on damages may be constitutional, it may only occur under an extremely deferential abuse of discretion standard. This is the standard to which this Court alluded in its recent cases raising

(but declining to decide) the issue of whether appellate review of jury awards is ever constitutional. For "abuse of discretion" to be more than an empty incantation, it must mean that a District Court's denial of a new trial motion based on the amount of damages will be overturned by the Court of Appeals only when there is *no evidence* in the record to support the amount awarded. A federal appellate court may not re-weigh conflicting evidence and substitute its own assessment of damages for that of the jury.

To reach its decision, the Court of Appeals not only ignored the Constitution and this Court's precedents; it also ignored the evidence, on which the jury relied, demonstrating the value of Mr. Gasperini's photographs. Because the presence of that evidence at trial is undeniable, and because a federal appellate court may not substitute its re-weighing of conflicting evidence for the assessment of the jury, the decision of the Court of Appeals must be reversed and the judgment of the District Court and verdict of the jury reinstated.

ARGUMENT

I. IN A DIVERSITY CASE, FEDERAL COURTS ARE CONSTRAINED BY THE SEVENTH AMENDMENT AND MUST APPLY A FEDERAL, NOT STATE, STANDARD WHEN ASKED TO REVIEW A MOTION FOR A NEW TRIAL.

When a district court sitting in diversity leaves undisturbed the jury's findings of fact, a federal appellate court, if it may review the decision at all, must do so under a federal standard of review. This result is logically inescapable because the limits of such review are set by the Seventh Amendment's mandate that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Regardless of how the Amendment's strictures are interpreted, their application to a federal court's reexamination of a jury's fact-finding on damages is beyond question. *See Dimick v. Schiedt*, 293 U.S. 474 (1935) (federal district court award of additur violates Seventh Amendment). The Rules of Decision Act

cannot -- and does not purport to -- direct the use of a state standard where a federal constitutional standard controls. *See* U.S. Const., Art. VI, cl. 2 (Supremacy Clause); 28 U.S.C. § 1652.[7] It has long been the law that federal courts cannot review *de novo* facts determined by a jury. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 243-46 (1897); *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277-79, 281-82 (1870). In contrast, some state courts, such as New York, are empowered to do just that. N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995).[8] State law cannot be used to justify a federal appellate court's *de novo* review of a jury's findings of fact any more than it could cause federal judges to be voted out of office.[9]

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[7] "The laws of the several states, except where the Constitution or treaties of the United States or Acts or Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

[8] "The appellate division shall review questions of law *and questions of fact* on an appeal . . . ." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995) (emphasis supplied). This provision "encapsulates the long-settled law" on the Appellate Division's broad powers of review. 7 Jack B. Weinstein et al., *New York Civil Practice* ¶ 5501.19, at 55-50 (1995). *See, e.g., id.*, ¶ 5522.03, at 55-210 ("The Appellate Division has the power to set aside a jury verdict when the verdict is against the weight of the evidence."); *Cohen v. Hallmark Cards, Inc.*, 382 N.E.2d 1145, 45 N.Y.2d 493, 498 (1978) ("In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether the particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury . . . and the Appellate Division concludes that the jury has made erroneous factual findings, the court is *required* to order a new trial") (emphasis supplied). In contrast, the section delineating the scope of review of the State's highest court provides: "The court of appeals shall review questions of law only, except that it shall also review questions of fact *where the appellate division . . . has expressly or impliedly found new facts* . . . ." N.Y. Civ. Prac. L. & R. § 5501(b) (McKinney 1995) (emphasis supplied). State courts are not bound by the Seventh Amendment. *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

[9] In considering the Second Circuit's adoption of a New York State rule according substantially less deference to the jury, it is worth observing that the New York State Constitution, unlike the federal Constitution, provides another process by (continued...)

Citing both to the Seventh Amendment and fundamental federal policy, this Court has repeatedly held that federal courts sitting in diversity must apply federal law on the division of fact-finding responsibility among the jury, district judge and appellate court. A unanimous Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), held:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . . *Federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.*

492 U.S. at 278-79 (citations and footnotes omitted) (emphasis supplied); *see id.* at 280 n.26 ("federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant . . . to take steps which ultimately might interfere with the proper role of the jury."). *Browning-Ferris* merely reconfirmed the earlier statement in *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977), that in diversity cases "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." As this Court stressed in

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[9] (...continued)
which the state judiciary remains in touch with "the layman's common sense" and the "wishes and feelings of the community," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting): the judges of the trial-level Supreme Court and the Appellate Division are elected. *See* N.Y. Const. art. 6, § 6(c) (the "justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve"); *id.*, § 4(c) (the appellate division shall consist of supreme court justices so designated by the governor). *See infra* note 14 (on federalism). The New York State standard of review which the Second Circuit has grafted on to the federal appellate process is but one element of a state judicial system that has divided fact-finding responsibilities in a manner fundamentally different from the federal system. *See supra* note 8 (on Appellate Division power to find facts); *infra* note 15 (power to award additur).

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 538-39 (1958):

> It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. . . . "[S]tate laws cannot alter the essential character or function of a federal court" . . ., and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court . . . . Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury "is an essential factor in the process for which the Federal Constitution provides."

Id. (quoting *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931) (citations omitted)). *See also Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam) ("[w]e agree . . . that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.") (citations and footnotes omitted); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962).

That the Seventh Amendment requires a federal standard to be used when reviewing a district court's denial of a new trial for excessive damages has been recognized by commentators[10] and

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[10] "The grant or denial of a new trial is a matter of procedure governed by these [federal] rules and not by state law or practice. There has been an occasional dictum to the contrary, and some slight tendency to look to state law on such questions as ordering a remittitur or reviewing the excessiveness of a verdict, but this seems quite unsound. The incidents of jury trial are for the federal courts to decide for themselves, guided by the Seventh Amendment, and are not a matter on which state law should be given any effect." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2802, at 42-45 (2d (continued...)

most of the Courts of Appeals that have analyzed the issue.[11] While some other Courts of Appeals, with little or no explanation, have employed a state standard of review, none has used state standards to shift fact-finding power as radically as has the Second Circuit.[12]

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[10] (...continued)
ed. 1995) (footnotes omitted); *see also* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 329 ("It is . . . difficult to understand how federal judges can assess the extent of their authority under the seventh amendment by looking to the practices of state judges, who, so far as the federal constitution is concerned, are free to re-examine any fact found by a state jury."); Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. Rev. 271, 326-27 (1994).

[11] *See Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994) (Easterbrook, J.) (adopting federal standard after considering Seventh Amendment, this Court's precedents, Seventh Circuit caselaw and positions of other circuits); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991) (federal standard of review required because "right to jury trial secured by the Seventh Amendment . . . reserves the weighing of evidence and the finding of facts exclusively to the jury"); *LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 447 (1st Cir. 1976) (federal standard of review required because "the seventh amendment not only assures . . . a jury trial but also that the jury's factual determinations will be reexamined only 'according to the rules of the common law'"); *see also Vizzini v. Ford Motor Co.*, 569 F.2d 754, 760 (3d Cir. 1977) (the standard of review of a district court's decision on a motion for new trial "is a matter of federal procedure and is, in no wise, subject to state practice"). In a partial dissent in *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1160-67 (5th Cir. 1985), Judge Tate also offered a detailed analysis of why a federal appellate court may not apply a state standard of appellate review as to the trier of fact's determination of damages.

[12] While only the Second Circuit has explicitly rejected the use of a federal standard of appellate review of jury verdicts in diversity cases, several circuits have, without explanation, stated that a federal standard of review is applicable and then applied a state standard of review in reexamining the jury's findings on damages. *See Piotrowski v. Southworth Products Corp.*, 15 F.3d 748, 754 (8th Cir. 1994) ("As an appellate court, we . . . may not reverse except for a manifest abuse of discretion. . . . In considering the excessiveness of a verdict, we are guided by the law of the forum state."); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 (continued...)

In the present case, the Court of Appeals justified its extensive reweighing (and recharacterization) of the evidence on a "cold paper record," Pet. App. 9a, by reference to a New York State Civil Practice provision providing that where a jury returns an itemized verdict, the State's Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. ("CPLR") § 5501(c) (McKinney 1995). Under New York law, CPLR § 5501(c) empowers the Appellate Division to make a complete reexamination of the jury's fact- finding in determining whether to order a new trial or award conditional remittitur or additur. The Court of Appeals readily recognized that this standard altered the division of fact-finding responsibility by "accord[ing] less deference to the jury's award than does the traditional standard, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court," Pet. App. 8a, but considered itself bound to use the New York State standard of review under the Second Circuit's recent decision in *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003 (2d Cir. 1995) (amended).[13] In *Consorti*, the Court of Appeals also recognized

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12 (...continued)
F.2d 1441, 1446 (11th Cir. 1991) ("We look to Georgia law to determine whether the verdict is excessive, but federal law applies to our review of the decision to order a new trial as the result of an excessive verdict."); *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1155-56 (5th Cir. 1985) (asserting that it is unnecessary to resolve the issue because state and federal standards are similarly "subjective," then determining that damages were excessive in comparison to state court awards). The lack of analysis by those courts of appeal that have applied a state standard of review to a jury's findings on damages has been noted by other judges. *See Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d at 332 (Seventh Circuit cases applying state standard of review do not cite earlier cases specifying a federal standard, nor provide reasons for the change); *In re Air Crash Disaster Near New Orleans*, 767 F.2d at 1166 (Tate, J., dissenting in part) ("no circuit decision that I can find explains on any articulated basis" how a state standard of appellate review would apply to a district court's denial of a motion for remittitur).

13 In the Court of Appeals opinion below, and in the *Consorti* opinion, the Second Circuit failed to observe any basis for the fact-finding role of the jury in either the text of the Constitution or this Court's precedents. Instead it referred to a (continued...)

that "the New York rule . . . is less deferential to the jury's verdict than the federal standard," yet found the New York State Appellate Division standard of review of the jury's findings of fact on damages applicable in diversity because it considered the rule "substantive." *Id.* at 1011 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

The Second Circuit's reasoning in *Consorti* is deeply and dangerously flawed. No *Erie* analysis can justify the substitution of a state rule for a standard mandated by the Seventh Amendment. *See* U.S. Const. art. VI, cl. 2; 28 U.S.C. § 1652; *Browning-Ferris*, 492 U.S. at 278-80 & n.26; *Byrd*, 356 U.S. at 538-39.[14] A

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13 (...continued)
deferential standard of review of jury fact-finding as no more than a tradition of the Second Circuit. *See* Pet. App. 8a; *Consorti*, 72 F.3d at 1011-12.

The amended *Consorti* opinion discussed here was issued after the Second Circuit's decision in *Gasperini*. The original opinion, *Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, 789-90 (2d Cir. 1995), on which the *Gasperini* court relied, offered no reasons for use of a state standard of review.

14 Although a policy analysis under *Erie* and *Hanna v. Plummer*, 380 U.S. 460, 467 (1965), cannot be used to displace the constitutionally-mandated fact-finding role of the jury in federal courts, we note that adherence to the constitutional standard in diversity cases does not offend the policies of *Erie*. According juries the deference traditional at common law does not lead to inequitable administration of the laws. Moreover, any claim that the Second Circuit's action discourages forum-shopping by reducing variation between the two fora is particularly nonsensical, because the Second Circuit's lopsided adoption of the CPLR § 5501(c) remittitur standard without its accompanying additur standard, *see infra* note 15, does not conform the federal court's standard of review to that of the state. As the additur example illustrates, the differences in the structure and procedures of the state and federal systems are numerous and fundamental; taking one state procedure out of its context and inserting it into the federal process may create a larger, rather than smaller, difference between the state and federal tribunals. *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2802, at 45 (2d ed. 1995) (footnote omitted) ("even if this is thought to be an unfettered Erie choice, within the doctrine of Hanna v. Plummer, it seems beyond belief that parties would resort to forum shopping in order to have a more favorable rule on granting new trials"); Steven Alan Childress, *Judicial* (continued...)

contrary view leads to absurdities. For example, CPLR § 5501(c), which the Second Circuit purported to adopt under *Erie*, empowers the New York Appellate Division to require additur where it finds the jury award "inadequate"; if, as the Second Circuit reasoned, CPLR § 5501(c) must control the Court of Appeals' review of the jury's findings on damages, then the Second Circuit is required to employ the additur as well as remittitur powers conferred by the provision. Yet it is well-established -- even in the Second Circuit -- that the use of additur in federal courts violates the Seventh Amendment.[15]

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[14] (...continued)
Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?, 47 SMU L. Rev. 271, 315-325 (1994) (*Erie* analysis counsels for a uniform federal standard of review).

Principles of federalism are in no way compromised by the Seventh Amendment's requirement of deference to jury fact-finding in federal courts. When a state legislature endows its own appellate judges – who may be elected to office by the citizens of the state, or appointed by the governor and approved by the legislature of that state, and are controlled by the constitution, substantive law and procedural law of that state -- with greater power to disturb jury fact-finding, there is no reason to believe that the legislature would also favor the same power be accorded life-tenured federal appellate judges who may have little connection to the state and certainly are not answerable to its citizens. At the time the Constitution was framed, trial by jury was considered an essential check on a potentially elitist federal judiciary. *See* 3 *The Complete Anti-Federalist* 61 (Herbert Storing ed., 1981) (A Democratic Federalist) ("what satisfaction can we expect from a lordly court of justice. . . . O! my fellow citizens, think of it while it is yet time, and never consent to part with the glorious privilege of trial by jury, but with your lives.").

[15] *See Dimick v. Schiedt*, 293 U.S. 474 (1935); *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir. 1994) ("we are mindful that a federal court's increase of a jury award would constitute impermissible additur where it would violate the Seventh Amendment right to a jury trial."); *cf. Sharrow v. Dick Corp.*, 612 N.Y.S.2d 537, 538-39 (App. Div. 1994) ("We conclude that the damages awarded for past and future pain and suffering deviate materially from what would be reasonable compensation (*see*, CPLR 5501[c]). A new trial on damages . . . is granted unless defendants . . . stipulate to *increase* the verdict to $100,000 for past pain and suffering and $50,000 for future pain and suffering") (emphasis supplied), *rev'd on other grounds*, 86 N.Y.2d 54, 629 N.Y.S.2d 980 (1995).

The *Consorti* opinion was in error not only in its assumption that *Erie* controls the choice of standard of review over jury findings of fact, but also in its assertion that the state standard of review was "substantive." The standard of review used by a court examining a finding of law or of fact, made by a judge or a jury, is a procedural matter distinct from the substantive law underlying the claim at issue. As Judge Easterbrook observed:

> Take a jurisdiction in which even a scintilla of evidence favoring the plaintiff requires submission of the case to a jury. The judge does not instruct this jury that a scintilla of evidence is enough for the plaintiff to prevail . . . . The "scintilla of evidence" standard determines *who* resolves the factual dispute, and a "preponderance [of the evidence]" standard tells that body *how* to evaluate the evidence presented . . . . [N]othing in *Erie* or the Rules of Civil Procedure commands a federal court to accept the state's views about who should evaluate the evidence.

Mayer v. Gary Partners & Co., Ltd., 29 F.3d at 335 (emphasis in original).[16] Like the "scintilla of evidence" standard, or a "clearly erroneous" standard, New York's "deviates materially" standard is not used to instruct the original finders of fact, but rather is used to determine the point at which the fact-finding power shifts from the jury to the Appellate Division. *See also Concrete Pipe & Products v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2279 (1993) (standards of review describe "not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.").

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[16] While the Seventh Circuit's explanation of the substance/procedure distinction is helpful, the federal standard of review it adopts in *Mayer* does not appear to differentiate between the district court judge who witnessed the trial and the court of appeals judges who did not. The Seventh Amendment mandates such a distinction. *See infra* Points II and III.

In attempting to characterize the New York State standard of review as substantive, the *Consorti* court likened it to state laws that disallow compensation for nonpecuniary loss, or that schedule the damages awarded in the manner of workers' compensation statutes, arguing that the New York rule also sets a limit on the damages a jury may award. *See* 72 F.3d at 1011. The two hypothetical provisions offered by the Court of Appeals, however, set absolute limits on damages as a matter of law and have nothing to do with the fact-finding process. In contrast, a standard that limits jury verdicts to what an appellate court considers "reasonable" after re-weighing the evidence is not a substantive limit on the right to obtain damages but a procedural determination of who will assess damages.[17]

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[17] Equally unjustifiable under an *Erie* analysis is the practice by some Circuits of using the damages awarded in unrelated but allegedly similar state cases to set an upper boundary on the damages available in the case at issue. *See, e.g., In re Air Crash Disaster Near New Orleans*, 767 F.2d at 1156 (reducing jury award of $400,000 for loss of child in part because "[t]he highest reported Louisiana state court award for the loss of the love and affection of a child appears to be $150,000.").

> It seems evident that no question of *Erie*-controlling state substantive law is implicated by state appellate decisions, as to whether under state standards of appellate review a state trial-award was or was not excessive under the particular facts before the state courts. The state appellate decisions in the particular instances no more represent state substantive law than does one trial-jury's quantum award bind as a matter of state law another state trial court in its award of damages for similar injuries in another case.

Id. at 1165 (Tate, J., dissenting in part). To assume that the size of verdicts in allegedly similar earlier state cases are correct and *binding* in the cases at issue is indeed "an unusual use of offensive collateral estoppel." Schnapper, *supra*, 1989 Wis. L. Rev. at 331. This case provides a stark example of the danger in this approach. The court below looked to *MacWeeney, Inc. v. Esquire Assocs.*, 574 N.Y.S.2d 340, 341 (App. Div. 1991), to determine the value of photographs where there is no evidence of uniqueness. Pet. App. 4a-5a. But, the court in *MacWeeney* reduced the findings on damages after a bench trial because "at least 114 of the [189] slides were of the same pose, and the balance were of only two other poses." 574 N.Y.S.2d at 341.

Having incorrectly declared the Appellate Division's standard of review of a jury's fact-finding on damages to be "substantive," the *Consorti* court then argued that this Court in *Browning-Ferris* declined to craft a set of federal common law standards for the award of punitive damages.[18] *See* 72 F.3d at 1012 (citing *Browning-Ferris*, 492 U.S. at 279-80). This argument makes no sense. The *Browning-Ferris* petitioners and their *amici* had urged the Court to place substantive limits on the factors relevant to a determination of punitive damages. *See* 492 U.S. at 279. However, this Court's discussion of the substantive proposals had nothing to do with the appropriate standard of appellate review, which the Court had already stated must be governed by federal law. *Id.* at 278-79. The Court's refusal to adopt the *Browning-Ferris* petitioners' recommendations as a matter of "federal common law" is not apposite.

Unraveling the reasoning that led the Court of Appeals to re-weigh the evidence of Mr. Gasperini's loss -- without having heard a single witness and without ever having seen any reproduction of his work -- is a difficult task. Fortunately, the reasoning that should have been employed by the Court of Appeals is far more straightforward: The "strictures of the Seventh Amendment," *id.* at 280 n.26, control the standard of review when a federal court of appeals reexamines a jury's findings of fact on damages. The constitutionally mandated fact-finding role of the jury in federal courts cannot be eviscerated by the adoption of a state standard of review in diversity cases.

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[18] *See, e.g.*, Brief for Petitioners at 43, *Browning-Ferris* ("there is no basis in economic logic for giving any substantial weight to the size of a corporate defendant"); Brief Amici Curiae of Arthur Anderson & Co. in Support of Petitioners, *Browning-Ferris* (arguing against imposition of punitive damages based on vicarious organizational liability).

II. THE SEVENTH AMENDMENT PROHIBITS APPELLATE REVIEW OF A JURY'S FACT FINDINGS, ABSENT TRIAL ERROR.

The reexamination clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," U.S. Const. amend. VII, prohibits appellate review of a jury's fact-findings absent trial error. This language is *sui generis*; only the Seventh Amendment commands us to look to the rules of common law for its meaning. The history of the Amendment demonstrates that the reexamination clause was a response to critics who feared that the Supreme Court's appellate jurisdiction over "Law and Fact," U.S. Const. art. III, § 2, cl. 2, would allow appellate review of jury fact-finding, and thus abolish jury trials. Under the English common law preserved by the Seventh Amendment, as well as under American jurisprudence at the time the Amendment was ratified, such appellate review of jury fact-finding was impossible. Only the judge who tried the case possessed any ability to disturb the jury's findings. The prohibition of appellate review of a jury's fact-finding has been reaffirmed by this Court in a multitude of never-repudiated cases spanning 150 years, and should be reaffirmed again in this case.

A. The Seventh Amendment's "Reexamination Clause" Was Designed to Prevent The Exercise Of Appellate Review Over Issues Of Fact Decided By A Jury, By Restricting Appellate Courts To The Common Law "Writ Of Error."

By the time of the Constitutional Convention of 1787, trial by jury was already established as "the form of trial in civil cases to which people and their politicians were strongly attached." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 656 (1973).[19] Yet, when the

[19] "The right to trial by jury was probably the only one universally secured by the (continued...)

Convention was held, the framers made no provision for a bill of rights generally or for the right to trial by jury in civil cases specifically. When it came before the state ratifying conventions, "[o]ne of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).[20]

One of the principal arguments made by the "antifederalists" who fought for the constitutional guarantee that became the Seventh Amendment was that the right to jury trial would be abolished by the Constitution's provision that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . . ." U.S. Const. art. III, § 2, cl. 2. The Seventh Amendment's reexamination clause was designed to address this concern, by preventing appellate review of jury fact-findings in the federal courts. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913).

Only a month after the Constitution was transmitted to the Continental Congress, Richard Henry Lee of Virginia attacked the provision for appellate review of facts, arguing that as a result "the jury trial is not secured . . . ." 2 *The Complete Anti-Federalist* 244

19 (...continued)
first American state constitutions . . . ." L. Levy, *Freedom of Speech and Press in Early American History -- Legacy of Suppression* 281 (1963). The first Continental Congress unanimously resolved that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress 28 (1774). The Articles of Confederation, art. IX, likewise guaranteed the right to trial by jury.

[20] Indeed, "the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Wolfram, *supra*, 57 Minn. L. Rev. at 657. *See* James Madison, *Debates in the Federal Convention*, in 2 *Records of the Federal Convention of 1787*, at 587-88, 628, 633 (Max Farrand ed., 1911).

(Herbert J. Storing, ed., 1981).[21] At the Virginia ratifying convention, Patrick Henry argued against the federalists' effort "to persuade us to part with that trial by jury," thus: "I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. *No appeal can now be made as to fact in common-law suits*." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 544 (Jonathan Elliot ed., 1891) (hereinafter "*Elliot, Debates*") (emphasis supplied); *see also id.* at 546.[22]

In Pennsylvania, a "Democratic Federalist" publicly attacked appellate authority to review facts as abolishing the right to jury trial:

> The word *appeal*, if I understand it right, in its proper legal significance includes the *facts* as well as the *law*, and precludes every idea of a trial by jury. . . .
>
> An *appeal*, therefore, is a thing unknown to the common law. Instead of an appeal from facts, it admits of a second, or even third trial by different juries, and mistakes in points of *law* are rectified by superior courts in the form of a *writ of error* . . . .

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[21] "By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to facts, to any judges whatever -- the jurisdiction of the jury is complete and final in this; and only errors in law are carried up to the house of lords, the special supreme court in Great Britain; or to the special supreme courts in Connecticut, New-York, New-Jersey, &c. Thus the juries are left masters as to facts: but, by the proposed constitution, directly the opposite principle is established. An appeal will lay in all appellate causes from the verdict of the jury, even as to mere facts, to the judges of the supreme court." *Id.* at 322.

[22] *See also* 3 *Elliot, Debates* 568 (statement of William Grayson) ("trial by jury is given up . . . as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper"); *id.* at 527-28 (statement of George Mason) (with the grant of "appellate jurisdiction . . . both as to law and fact . . . [i]s not a jury excluded absolutely?").

Pennsylvania and the Federal Constitution, 1787-1788, 152-53 (John B. McMaster & Frederick D. Stone eds., 1888) (emphasis in original). As indicated, the antifederalists repeatedly adverted to their understanding of the common law, which prohibited appellate review of a jury's fact-findings under the writ of error.[23] When the Pennsylvania antifederalists met several months after the ratifying convention to propose amendments to the Constitution, among them was a proviso to be added to article III, § 2, that "appellate jurisdiction, in all cases of common-law cognizance, be by a writ of error, and confined to matters of law only." 2 *Elliot, Debates* 546. *See also* 3 *The Complete Anti-Federalist*, *supra*, at 159 ("appeal from both *law* and *fact* . . . is utterly inconsistent with the principles of the common law, and trials by jury") (emphasis in original).[24]

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[23] *See* Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 W. & Mary Q. 301, 311 (1965) ("Jury Trials may be superceded in Civil Cases[.] Appellate Jurisdiction is a Civil Law Term[.] There can be no Appeal after Jury Trials. I fear there is an Intention to substitute the Civil Law in the Room of the Common Law[.]") (statement of John Smilie); *see also id.* at 311, 312 ("Writ of Attaint lies against a Jury for giving a false Verdict . . . . England corrupt as she is would not fix an Innovation like our Appellate Jurisdiction") (same).

[24] Similar arguments for preventing appellate review of a jury's fact-findings were made in the other state ratifying conventions. In New York, the antifederalists moved to amend article III, § 2, to provide that "all appeals" in common law actions "are to be by writ of error, and not otherwise." 2 *Elliot, Debates* 408-09. This proposed amendment was made part of the convention's ratifying document. 1 *Elliot, Debates* 328, 329; *see also* 2 *The Complete Anti-Federalist*, *supra*, at 431, 433. Likewise, in Maryland the antifederalists proposed an amendment that from jury trials "there shall be no appeal . . . except on matter of law," to "prevent the appeal from fact, which . . . destroys that trial in civil cases . . . ." 2 *Elliot, Debates* 550-51. *See also* 2 *The Complete Anti-Federalist*, *supra*, at 70 (statement of Luther Martin) (right to jury trial is "*take[n] away*" by "appellate jurisdiction both as to law and *fact*") (emphasis in original).

The federalists, not surprisingly, viewed federal appellate power to review a jury's fact-findings more positively. In Pennsylvania, James Wilson defended the exercise of appellate review as to both law and fact to restrain juries from making egregious determinations. 2 *Elliot, Debates* 493-94; *see also id.* at 518-19.

(continued...)

Shortly after the Constitution was adopted and the new government began operations, Madison introduced suggested amendments in Congress, to show his constituents that their representatives were taking a proper attitude "to a subject they have much at heart." 1 Annals of Cong. 444 (Joseph Gales ed., 1789).[25] With little recorded debate, Congress ultimately combined these provisions to form the Seventh Amendment. Two years later, when the requisite States ratified the Seventh Amendment, the antifederalist argument for limiting appellate review of jury verdicts to the common law writ of error became part of our constitutional design.

B. When The Seventh Amendment Was Adopted, The English Common Law Writ of Error Only Permitted Appellate Review Of Questions Of Law, And Absent Trial Error, Appellate Review Of A Jury's Fact Findings Was Precluded.

The ratifiers who pressed for the Seventh Amendment correctly understood their common law heritage.[26] While the structure of

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24 (...continued)
Likewise, Wilson's colleague, Thomas McKean, defended appellate review of facts. *Id.* at 539-40; *see also* Pittman, *supra*, 22 Wm. & Mary Q. at 314 (statement of Thomas McKean). But in considering the debates of the federalists and antifederalists over the scope of appellate review, one must bear in mind that "on the matter of civil jury trial the antifederalists won." Wolfram, *supra*, 57 Minn. L. Rev. at 672.

25 As originally written, the Seventh Amendment's reexamination clause amended the Constitution's provision for "appellate Jurisdiction, both as to Law and Fact . . . ." U.S. Const. art. III, § 2, cl. 2. *See* 1 Annals of Cong. 452, 784 (Joseph Gales ed., 1789).

26 In construing the Seventh Amendment's reexamination clause this Court has repeatedly held that the provision's reference to common law "had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states." *Capital Traction Co. v. Hof*, 174 U.S. 1, 8 (1899); *see also Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *cf. United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16, 750). *See* (continued...)

the English common law courts could be confusing,[27] the method of reviewing the judgment of a trial court was straightforward. At the time of the passage of the Seventh Amendment, all appellate review of the common law trial courts was by "writ of error." Under this procedure, only questions of law, not a jury's findings of fact, could be reviewed. As Blackstone stated:

> A writ of error lies for some supposed mistake in the proceedings of a court of record . . . . The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of *facts*, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

3 William Blackstone, *Commentaries on the Laws of England* 405-06 (1st ed. 1768) (hereinafter "Blackstone, *Commentaries*") (emphasis in original); *see also* Thomas Wood, *An Institute of the Laws of England* 611 (3d ed. 1724) (no writ of error "if the Errors are only Matters of Fact, because it may be brought in the same Court to Reverse it"). Specifically, "one could not bring a writ of

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26 (...continued)
also Wooddell v. Int'l Brotherhood of Electrical Workers, 112 S. Ct. 494, 497 (1991).

27 The three common law trial courts – the King's Bench, the Court of Common Pleas, and the Court of Exchequer – had coordinate jurisdiction in many types of cases, and the system of review among them was complicated as well. Theodore F. T. Plucknett, *A Concise History of the Common Law* 210 (5th ed. 1956). Moreover, under this system a court might act in both a trial and appellate capacity. G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 212-13 (3d ed. 1954); *see also* 3 William Blackstone, *Commentaries on the Laws of England* 410-11 (1st ed. 1768); Thomas Wood, *An Institute of the Laws of England* 610-11 (3d ed. 1724). (This confusing system of appellate jurisdiction was simplified somewhat in 1830. *See* Radcliffe & Cross, *supra*, at 213-14; Plucknett, *supra*, at 210.) Although unusual in today's practice, such a system whereby a judge or court would act in both a trial and an appellate capacity (in different cases) was not foreign to early American jurisprudence.

error . . . that the verdict was against the evidence . . . . For the same reason one could not appeal against a refusal of the court *in banc* to grant a new trial . . . ." Radcliffe & Cross, *supra*, at 211-12.

This does not mean that a jury's verdict could not be challenged at common law. Rather, the writ of error procedure meant that, in the absence of any trial error, any challenge to the jury's verdict had to occur in the trial court. Thus, a party could move to set aside the verdict and have a new trial on a variety of grounds, including that there was jury misconduct, or that the trial court misdirected (or improperly instructed) the jury, or that the verdict was against the weight of the evidence, or that the damages awarded were excessive. Wood, *supra*, at 602; 3 Blackstone, *Commentaries* 375-76, 387-88; Radcliffe & Cross, *supra*, at 187. But any such motion for a new trial had to be made to the trial court and, as already noted, the trial court's denial of a new trial was not reviewable on a writ of error. Radcliffe & Cross, *supra*, at 211-12.

There is not a single English common law decision from the period of the Seventh Amendment's adoption that asserts the power of an appellate tribunal to review a jury's fact-findings, or to review the denial of a motion for a new trial. So well established are historical limits on the common law writ of error, even proponents of appellate review of jury verdicts concede that the writ of error was available only for some error of law, there was no review of the verdict as against the weight of the evidence on appeal, and a party could not seek appellate review of the denial of a motion for a new trial. *See, e.g.*, Jerry LeMond, *Federal Review of Excessive Verdicts*, 30 Tex. L. Rev. 242, 244 & n.19 (1951) (conceding "the absence of cases in which new trials were granted by the Court of King's Bench when it sat as a court of appeals from Common Pleas").

Modern arguments for appellate review of jury fact-findings, therefore, eschew reference to the actual appellate procedures available at English common law when the Seventh Amendment was enacted. Instead, twentieth century proponents of appellate

review rely on *trial* procedures developed in the seventeenth century, to argue that English common law trial courts them-selves exercised a "quasi-appellate" review of jury fact-findings.

The English common law trial courts sat at Westminster Hall in panels of four justices each. The trial court thus constituted would hear cases *en banc*, meaning that the case was tried by a jury "at the bar" with all four justices present. 3 Blackstone, *Commentaries* 352; Radcliffe & Cross, *supra*, at 90.[28] Over time it became inconvenient to try every case at Westminster, so in the late thirteenth century a system developed that allowed cases to be tried by jury before a single judge who traveled to the county where the jurors, parties and witnesses were located. This system for conducting jury trials before a single judge outside Westminster Hall, analogous to the American practice of "riding the circuits," came to be known as the *nisi prius* system. 3 Blackstone, *Commentaries* 352-53. Gradually, the *nisi prius* system extended to civil proceedings of every sort, although jury trials "at the bar" continued to be held before the court *en banc* in Westminster in some cases. Radcliffe & Cross, *supra*, at 90-91. Generally, though not always, the *nisi prius* judge was a member of one of the three common law trial courts (the King's Bench, the Common Pleas or the Exchequer). *Id.* at 91; *see also* 3 Blackstone, *Commentaries* 354, 356.

While the jury proceedings could be conducted at *nisi prius*, the court sitting *en banc* at Westminster remained the trial court for the action. "Thus the action was commenced at Westminster, the pleadings . . . were conducted before the court at Westminster, and it was only if and when an issue of fact emerged which necessitated

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[28] Although trials held before *en banc* panels are largely unknown today in the United States, they were not uncommon at the time of the Seventh Amendment's adoption. *See, e.g., Thurston v. Martin*, 23 F. Cas. 1189, 1190 (C.C.D. R.I. 1830) (No. 14,018) (jury trial held before federal trial court consisting of Circuit Justice and District Judge); *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (C.C.D. Pa. 1804) (same); *Respublica v. Lacaze*, 2 Dall. 118, 121 (Pa. Sup. Ct. 1791) (jury trial held before *en banc* state trial court); *Den v. Vancleve*, 5 N.J.L. 680 (Sup. Ct. 1819) (same).

a trial by jury that the action was sent for trial at *nisi prius*." Radcliffe & Cross, *supra*, at 91. Moreover, when the verdict was reached at *nisi prius*, the "record was then remitted back to Westminster, where legal arguments of various sorts might take place before the court there before judgment was entered for one side or the other." *Id.*

At this point in the proceedings, a motion for a new trial might be made. Originally, such a motion was based on allegations of some kind of jury misconduct, but in the seventeenth century the practice expanded so a new trial could be granted if the judge misdirected the jury, if the verdict was against the weight of the evidence, or if the damages were excessive. *Id.* at 187. Because the motion for a new trial was heard by the trial court sitting *en banc* in Westminster, whereas only the *nisi prius* judge was actually present at the trial, some twentieth century courts and commentators have contended that the English common law trial courts exercised a kind of "quasi appellate" review of jury fact-findings.

This argument, however, is flawed in two respects. First, whether trial occurred "at the bar" or at *nisi prius*, the English common law court remained a *trial court*, and review of its judgments could be had only on writ of error. It makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination.[29]

More fundamentally, after verdict at *nisi prius* a new trial would be granted on the ground that the verdict was against the

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[29] *See Metropolitan R.R. v. Moore*, 121 U.S. 558, 571, 573 (1887) (although appellate review of denial of new trial motion implicates Seventh Amendment for local courts of District of Columbia, "that rule is not applicable, as between the special and general terms of the supreme court . . . . The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The supreme court sitting at special term, and the supreme court sitting in the general term, though the judges may differ, is the same tribunal.").

weight of the evidence *only* if "the judge who had tried the case 'conceived the verdict to be given against the evidence.'" Indeed, "[i]t was later held . . . that a new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence." Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Leg. Hist. 201, 213 (1988) (emphasis in original) (citations and footnotes omitted).

For example, in *Leighton v. Leighton*, 1 P.Wms. 671, 672, 24 Eng. Rep. 563 (Ex. 1720), an ejectment action was "tried in *Shropshire* . . . before Mr. Baron *Price*," and a verdict rendered for defendant, "but the Judge certifying against it, a new trial was granted to be at the bar of the *Exchequer* . . . ."

And in *Letgoe ex dem. Wheeler v. Pitt*, Barnes, 439, 94 Eng. Rep. 993 (K.B. 1740), the "cause was tried before Lord Chief Justice at the sittings, and a verdict obtained by lessor of plaintiff. Defendant moved to set aside the verdict . . . and also prayed the Chief Justice's certificate, suggesting that the verdict was contrary to evidence . . . Chief Justice certified . . . that the Chief Justice was of opinion the strength of the evidence was with defendant. Court ordered new trial . . . ."[30]

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[30] *See also Anon.*, 1 Keb. 864, 83 Eng. Rep. 1288 (K.B. 1665) ("the Court on certificate of a Judge, that verdict was given contrary to evidence . . . ordered the sheriff should retorn [sic] a good jury in the new trial"); *Berks v. Mason*, Sayer, 264, 265, 96 Eng. Rep. 874, 875 (K.B. 1756) ("Ryder Ch. J. before whom the cause was tried, reported . . . that the evidence, for the party in whose favour the verdict is found, was so very slight, . . . and . . . that he was dissatisfied with the verdict. . . . The matter was at that day ordered to stand over, for the Chief Justice to look into his notes, in order to make a fuller report. After the Chief Justice had made the above report, it was said in support of the rule; that if the Judge declare himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial . . .").

The common law courts relied on the *nisi prius* judge's personal knowledge of the trial proceedings. In *Mellin v. Taylor*, 3 Bing. N.C. 109, 132 Eng. Rep. 351 (C.P. 1836), the court said:

(continued...)

But if the *nisi prius* judge refused to certify that the verdict was against the weight of the evidence, or that the damages were excessive, the English common law courts consistently denied motions for new trials on those grounds. Thus, in *Redshaw v. Brook*, 2 Wils. K.B. 405, 95 Eng. Rep. 887 (C.P. 1769), the jury gave the plaintiff 2001. damages for trespass, and defendant moved for a new trial on the ground that the damages were excessive. Lord Chief Justice Wilmot, before whom the case was tried, reported: "Although I myself may think 2001. too large damages, yet how can we draw the line to fix the measure of damages in this case? I cannot say the jury have done wrong; and perhaps if I had been one of the jury, some of them might have convinced me that 2001. damages are little enough. I am not dissatisfied with the verdict." *Id.*, 95 Eng. Rep. at 888. Justice Clive, speaking for the court, said: "As my Lord Chief Justice is not dissatisfied, how can we say that these damages are too large? A rule to shew cause why there should not be a new trial was refused per totam Curiam . . . ." *Id.*

Similarly, in *Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685), the jury awarded 8001. damages in a case of slander, and the defendant moved "that the Court would grant a new trial for the excessiveness of the damage; whereupon the Court (according to the usage in such cases) gave the defendant time to procure the Judge of Assise, before whom the cause was tried, to signify his opinion of the cause." The judge before whom the case was tried found the verdict was not against the weight of the

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30 (...continued)

> Strong observations have been made, that we cannot have the opportunity of giving an opinion on the demeanour of the witnesses at the trial. . . . But in this case the learned Judge who presided at the trial had that opportunity; and he has reported to us that he is not satisfied with the verdict; a course which has in it no novelty whatever, but has been the constant practice from the earliest time at which new trials have been granted, and is acted upon every day.

Mellin v. Taylor, 3 Bing. N.C. at 112, 132 Eng. Rep. at 352.

evidence. "Whereupon judgment was given for the plaintiff . . . ."[31]

Contemporaneous commentators recognized a jury's verdict could be overturned and a new trial granted by the trial court, on

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31 *See also St. Bar v. Williams*, 3 Keb. 351, 84 Eng. Rep. 761 (K.B. 1674) (although *nisi prius* judge "said ore tenus to the Judges of this Court, that [the verdict] was against evidence," court denied motion for new trial, because there was no *written* certificate from the *nisi prius* judge); *Gilbert v. Burtenshaw*, 1 Cowp. 230, 98 Eng. Rep. 1059 (K.B. 1774) (new trial for excessive damages denied, where *nisi prius* judge "reported that he was very well satisfied with the verdict"); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766) (motion for new trial on ground that damages were excessive denied, where *nisi prius* judge "was not dissatisfied with the verdict"); *Anon.*, 1 Wils. K.B. 22, 95 Eng. Rep. 470 (K.B. 1743) (on motion for new trial, "the Judge who tried the cause certified . . . that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused"); *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (C.P. 1763) (motion for new trial on ground that damages were excessive denied, where *nisi prius* judge was "of opinion the damages are not excessive"); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786) (on motion to set aside verdict for excessive damages, "upon hearing the report of the Judge, the Court thought fit to reject the motion"); *Anon.*, 1 Keb. 4, 83 Eng. Rep. 775 (K.B. 1661) ("[t]he Court will not award new tryals on the jurors gainsaying their verdicts, unless the Judge before whom it was, conceived the verdict to be given against the evidence per Curiam").

When the common law courts began granting new trials after trial "at the bar" before the entire court sitting *en banc*, they recognized the essential function served by the judge's certificate in deciding whether to grant a new trial at *nisi prius*:

> Of late years, new trials have been granted not only after trials at Nisi Prius, but also after trials at Bar. And it is at least equally reasonable to do it after trials at Bar, as after trials at Nisi Prius, (if the justice of the case demands it;) or, indeed, rather more so, as the latter *must be done upon what could have actually and personally appeared to a single Judge only*, whereas the former is grounded upon what must have manifestly and fully appeared to the whole Court.

Bright v. Eynon, 1 Burr. 390, 395, 97 Eng. Rep. 365, 367 (K.B. 1757) (emphasis supplied).

the ground that the verdict was against the evidence or the damages were excessive, only if the *nisi prius* judge so certified. Thus, Blackstone succinctly set out the grounds for new trial as including legal error, jury misconduct, misdirection by the judge, or "the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages . . . ." 3 Blackstone, *Commentaries* 387 (footnotes omitted). *See also id.* at 388; *id.* at 391 (if the ground for a new trial "arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence");[32] VI *Bacon's Abridgment* 663-64 (6th ed. 1807) (citing a series of English common law courts for the proposition that "[a] new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence"); Wood, *supra*, at 602 ("A Verdict may be set aside *by the Judge, If it appears to Him* to be Given against Evidence, or against His Direction, or where they Give Excessive Damages &c. and *He may Order a New Trial*") (emphasis supplied).[33]

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[32] It bears emphasis that the "record" did *not* include the evidence presented at trial, Radcliffe & Cross, *supra*, at 211, so without the *nisi prius* judge's report, there was no way for the trial court to evaluate whether the verdict was supported by the evidence. *See also* 3 Blackstone, *Commentaries* 374 (arguing that only live testimony at trial presents "an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge").

[33] While the *nisi prius* judge's certification was required, it was not sufficient to grant a new trial. Indeed, the English common law trial courts regularly denied new trial motions, notwithstanding the *nisi prius* judge's certification that damages were excessive or the verdict contrary to evidence. *See, e.g., Sharpe v. Brice*, 2 Black. W. 942, 96 Eng. Rep. 557 (C.P. 1774); *Rex v. Bennett*, 1 Str. 101, 105, 93 Eng. Rep. 412, 414 (K.B. 1795); *Gough v. Farr*, 1 Y. & J. 477, 480, 148 Eng. Rep. 759, 760 (Ex. 1827); *Swain v. Hall*, 3 Wils. K.B. 45, 46-47, 95 Eng. Rep. 924, 925 (C.P. 1770); *Macrow v. Hull*, 1 Burr. 11, 97 Eng. Rep. 161 (K.B. 1764); *Farewell v. Chaffey*, 1 Burr. 54, 97 Eng. Rep. 187 (K.B. 1756); *Ashley v. Ashley*, 2 Str. 1142, 93 Eng. Rep. 1088 (K.B. 1740); *Smith v. Huggins*, 2 Str. (continued...)

In sum, as the ratifiers well knew, at English common law a jury's determination of facts was not subject to appellate review. In the absence of trial error, any challenge to a jury verdict as being against the weight of the evidence, or for granting excessive damages, could only be made in the trial court. Moreover, the denial of a new trial motion was not subject to appellate review. This well-established common law practice was enshrined as a constitutional principle by the Seventh Amendment's reexamination clause.

C. Contemporaneous American Jurisprudence And This Court's Precedents Spanning 150 Years Precluded Appellate Review Of A Jury's Fact Findings.

The day before Congress sent the bill of rights to the States for ratification, it passed the Judiciary Act of 1789, "always . . . considered . . . a contemporaneous exposition of the highest authority." *Capital Traction Co. v. Hof*, 174 U.S. 1, 10 (1899). The Act made several provisions for trial by jury, *see Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), and specifically provided that appellate review could be had only on writ of error for which "there shall be no reversal ... for any error in fact." Judiciary Act of 1789, § 22, 1 Stat. 84-85.

Because the statutory writ of error contained in the Judiciary Act of 1789, like the English common law writ of error, limited appellate review to issues of law, early decisions of this Court held that federal appellate review could not consider the excessiveness of damages. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830) described the Seventh Amendment's reexamination clause as

> a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than provided at common law]. The only modes known

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[33] (...continued)
1142, 93 Eng. Rep. 1089 (K.B. 1740); *Martyn v. Jackson*, 2 Keb. 398, 84 Eng. Rep. 787 (K.B. 1674); *Anon.*, 6 Mod. 22, 87 Eng. Rep. 786 (K.B. 1794).

> to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings.

Thus, appellate review of a jury verdict as being against the evidence, or for excessiveness of damages, was forbidden. *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166-67 (1859) (whether jury's verdict was warranted "is not a question for an appellate tribunal. . . . Repeated decisions of this court have affirmed the doctrine" that after facts "have been found by a jury" an award of a new trial can only be made "by the court where the issue was tried"); *see also Texas & P. Ry. v. Behymer*, 189 U.S. 468, 469 (1903); *New York Central & Hudson River R.R. v. Fraloff*, 100 U.S. 24, 31 (1879).[34] From this it inevitably followed that the denial of a motion for a new trial could not be reviewed by a federal appellate court. *See New York, L. E. & W. R.R. v. Winter's Administrator*, 143 U.S. 60, 75 (1892) ("[w]hether the verdict was excessive is not our province to determine"); *Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 191 (1809) ("improper in this court to determine whether the inferior court [should] have granted the motion . . . below for a new trial, upon the ground that the verdict was contrary to the evidence"); *see also Fairmount Glass Works v.*

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[34] The lower federal courts likewise followed the English common law practice. In *United States v. Wonson*, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750), Justice Story held "an appeal to the circuit court should be governed by the same rules and regulations, as a writ of error, viz. – that nothing but errors of law could be examined." Accordingly, the court held, the federal appellate courts were prohibited from reexamining a jury's fact findings, or from granting a new trial. *Id.* at 750. The court described the common law writ of error, precluding appellate reexamination of a jury's fact findings, as "the invariable practice in every other circuit . . . ." *Id. See also Maddox v. Stewart*, 16 F. Cas. 361 (C.C.D.C. 1824) (No. 8,934); *Davidson v. Burr*, 7 F. Cas. 30 (C.C.D.C. 1824) (No. 3,602). On the other hand, Justice Story readily conceded that a federal trial court could grant a new trial for excessive damages. *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1,578).

Cub Fork Coal Co., 287 U.S. 474, 481 & nn.3-5 (1933) (citing cases).[35]

This federal practice precluding appellate review of a jury's fact-findings prevailed for at least 150 years and has never been repudiated by this Court.[36] *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).[37]

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[35] *See also Louisville & N. R.R. v. Holloway*, 246 U.S. 525, 529 (1918); *Texas & P. Ry. v. Hill*, 237 U.S. 208, 215 (1915); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909); *Blintz v. United States*, 153 U.S. 308, 312 (1894); *Fitzgerald & Mallory Constr. Co. v. Fitzgerald*, 137 U.S. 98, 113 (1890); *Arkansas Val. Land & Cattle Co. v. Mann*, 130 U.S. 69, 75-76 (1889); *Newcomb v. Wood*, 97 U.S. 581, 583-84 (1878); *Henderson v. Moore*, 9 U.S. (5 Cranch) 11, 12 (1809).

[36] *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *St. Louis Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 661 (1915); *Southern Ry. v. Bennett*, 233 U.S. 80, 86-87 (1914); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-79 (1913); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 246 (1897); *Lincoln v. Power*, 151 U.S. 436, 437-39 (1894); *Wilson v. Everett*, 139 U.S. 616, 621 (1891); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1883); *United States Express Co. v. Ware*, 87 U.S. (20 Wall.) 543, 545 (1875); *Mercantile Mutual Ins. Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 249 (1874); *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 269 (1873); *Fowler v. Rathbone*, 79 U.S. (12 Wall.) 102, 119 (1871); *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 281-82 (1870); *Mills v. Smith*, 75 U.S. (8 Wall.) 27, 32 (1869); *Hyde v. Stone*, 61 U.S. (20 How.) 170, 176 (1858); *Phillips v. Preston*, 46 U.S. (5 How.) 278, 289 (1847); *Zeller's Lessee v. Eckert*, 45 U.S. (4 How.) 289, 298 (1846); *Minor v. Tillotson*, 43 U.S. (2 How.) 392 (1844); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838).

[37] With the 1948 revision of the judiciary code, the Judiciary Act's explicit prohibition of reversal "for any error in fact" was removed. *See* 28 U.S.C. § 2105. However, even proponents of appellate review concede that this change was only made "to avoid any construction that matters of fact are not reviewable in nonjury cases." Reviser's Notes to Section 2105, H.R. Rep. No. 308, 80th Cong., 1st Sess. A173 (1947). *See Dagnello v. Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961).

D. The Permissible Scope Of Appellate Review Is Sufficient To Keep Jury Verdicts Within The Bounds Of The Law.

In its opposition to the petition for a writ of certiorari, respondent described as "frightening" the contention that the Seventh Amendment bars appellate review of jury fact-findings, and insisted such review is "necessitated by the increasing proclivity of juries to award excessive damage amounts." Brief in Opposition, at 6, 7. There is no cause for alarm. The scope of allowable appellate review is sufficient to keep jury verdicts, including damage awards, within legal boundaries.

First, respondent forgets that it may move for a new trial on grounds that the verdict is against the weight of the evidence or that the damages are excessive, and this motion will be heard by an Article III judge with lifetime tenure, who is as much a part of the independent judiciary as the Court of Appeals. Proponents of appellate review of jury fact-findings have never explained why District Judges are inadequate to the task of policing verdicts that go against the weight of the evidence.[38]

Second, because any error of law is reviewable on appeal, the Seventh Amendment allows litigants to challenge jury verdicts before the circuit courts on a wide range of grounds, such as improper admission of evidence, prejudicial statements by counsel, improper charge to the jury, misconduct affecting the jury, unfair surprise, falsified testimony or newly discovered evidence.[39] Indeed, respondent raised precisely such a challenge in this case, albeit unsuccessfully. Pet. App. 4a-5a.

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[38] The trial court's review of jury verdicts against the weight of the evidence and for excessiveness likewise provides adequate procedural due process. *Compare Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994).

[39] Where the appellate court reverses a judgment entered on a verdict for legal error, however, the proper remedy is not to enter a new judgment but to remand for a new trial. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 394 (1937).

Third, a litigant who believes evidence presented is legally insufficient to sustain a verdict can make a motion for a judgment as a matter of law (formerly a motion for directed verdict or J.N.O.V.). This Court has consistently held that a motion for judgment as a matter of law can be used to test whether an issue may properly be submitted to a jury and, consistent with the Seventh Amendment, the denial of a motion for a judgment as a matter of law is reviewable on appeal. On such review, the appellate court is not weighing the verdict against the evidence, but is applying a legal standard of sufficiency to the facts, resolving every dispute and drawing every permissible inference in favor of the nonmovant. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).[40]

Nothing prevented respondent from moving for a judgment as a matter of law in this case. Presumably, respondent's contention would have been that there was insufficient evidence as a matter of law to support an award of damages above a certain amount for some or all of the lost transparencies. Had respondent made such a motion, its denial would have been reviewable on appeal. *See, e.g., Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125, 126 (3d Cir. 1967) (defendant appealing from denial of JNOV motion on damages). Yet, respondent failed to make any motion for a judgment as a matter of law, and "[i]n the absence of such a request, we must assume that there was sufficient evidence to warrant the court in permitting the jury to draw inferences proper to be deduced from the evidence in the case." *Hansen v. Boyd*, 161

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[40] The distinction is critical for purposes of the Seventh Amendment's reexamination clause. As this Court has held, the Seventh Amendment's two provisions are separate and independent. *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277 (1870). Thus, where a jury trial is held, the reexamination clause is violated by appellate review of a jury's fact findings, even if there was no right to have the case tried by jury in the first place. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 244-46 (1897). While a motion for a judgment as a matter of law is premised on the assertion that an issue is not even properly before a jury, a motion for a new trial on the ground that the verdict is excessive or against the weight of the evidence can only be made after the verdict is rendered, and thus implicates the Seventh Amendment's reexamination clause. *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

U.S. 397, 402-03 (1896). Having failed to test the legal sufficiency of the evidence, respondent instead appealed from the denial of its motion for a new trial, thus taking advantage of the circuit court's re-weighing of the evidence against the findings of the jury. Contrary to respondent's assertion, this direct assault on the Seventh Amendment's reexamination clause is not only improper but unnecessary.[41]

III. ASSUMING *ARGUENDO* THAT THE SEVENTH AMENDMENT PERMITS APPELLATE REVIEW OF A JURY'S FACT FINDINGS, AN APPELLATE COURT SHOULD NOT SET ASIDE A VERDICT UNLESS THERE IS NO EVIDENCE TO SUPPORT IT.

The language and history of the Seventh Amendment, the unambiguous common law practice preserved by the Amendment, and a long line of this Court's decisions mandate a prohibition on appellate review of a trial court's decision not to set aside a jury's findings of fact on damages. But, as this Court has held repeatedly, even if one assumes *arguendo* that the Seventh Amendment permits appellate review of jury fact-findings, the correct standard of review would be abuse of discretion. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (assuming the Seventh Amendment does not preclude appellate review entirely, "[i]t is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not *abuse its discretion* in refusing to grant petitioner's motion . . . for a new trial or remittitur") (emphasis supplied); *Grunenthal v. Long Island R.R.*,

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[41] Even the denial of a new trial motion may be reviewed, if the trial court's decision is premised on legal error. For example, an appellate court may reverse the denial of a new trial motion if the district court improperly believed it was without jurisdiction to consider the motion, *see Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-83 (1933), or where the trial court improperly excluded appropriate matters from its consideration of the motion. *Mattox v. United States*, 146 U.S. 140, 147 (1892). In such a case, again the appropriate remedy is to reverse for a new trial. *Id.* at 153.

393 U.S. 156, 160 (1968) (same); *Neese v. Southern Ry.*, 350 U.S. 77 (1955) (per curiam) (same). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.) ("Whether failure to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge *abused his discretion*, we have no occasion to determine") (emphasis supplied).

As early Circuit Court decisions exercising appellate review held, an extremely deferential abuse of discretion standard is required because, when an appellate court reviews the denial of a new trial motion

> [t]wo factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.

Taylor v. Washington Terminal Co., 409 F.2d 145, 148 (D.C. Cir.) (Skelly Wright, J.) (citations omitted), *cert. denied*, 396 U.S. 835 (1969).[42] *See also Dagnello v. Long Island R.R.*, 289 F.2d 797,

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[42] In *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-47 (8th Cir. 1961) (citations and internal quotations marks omitted), then Circuit Judge Blackmun wrote:

> [This court has] . . . stated that the excessiveness of a verdict is not a question for our consideration but rather is a matter directed solely to the discretion judgment and conscience of the trial judge on a motion for a new trial. . . . [I]n reaching this result we have referred at times to the Seventh Amendment and to the common law as it existed in 1791 upon the Amendment's adoption. . . . [I]n our opinion inadequacy or excessiveness of a verdict is basically, and should be, a

(continued...)

806 (2d Cir. 1961) ("If we reverse it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial . . .").[43]

Without further direction from this Court, however, the abuse of discretion standard inadequately defines the constraints on appellate review imposed by the Seventh Amendment.[44] Such

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42 (...continued)
matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards.

43 An abuse of discretion standard comports with the principal, repeatedly upheld by this Court, that appellate courts must pay extreme deference to determinations of trial judges when those decisions are fact-based and therefore informed by the trial judge's first hand exposure to the evidence presented at trial. *See, e.g., Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-17 (1947); *Patton v. Texas & P. R.R.*, 179 U.S. 658, 660 (1901). Similarly, this Court has steadfastly adhered to the principle that *judge*-found facts should be insulated from appellate review in all but the most exceptional of circumstances. In considering the proper role of an appellate court in reviewing a Fed. R. Civ. P. 52 motion, this Court explained that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). *See also Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Snyder v. United States*, 350 U.S. 906 (1955) (per curiam) (reversing Court of Appeals and reinstating size of judgment awarded by District Court). Although the Seventh Amendment is not implicated when an appellate court reviews facts found by a judge, sound jurisprudence requires at least as much deference be given to facts found by a jury and upheld by a trial judge as is given to facts found by a trial judge.

44 Even when claiming to apply an abuse of discretion standard, appellate courts have on occasion shown remarkably little deference to the findings of the district court, and have remarkably overestimated their ability to re-evaluate facts. *See* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury* (continued...)

review must be limited to whether the trial court abused its discretion by refusing to set aside a verdict for which there is no support in the evidence.

In *Neese v. Southern Ry.*, 350 U.S. 77, 78 (1955), this Court explained that the power to review the excessiveness of a verdict (if it exists at all) is narrowly limited to whether there is any support in the record to support the verdict. *Id.* ("we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, *as an abuse of discretion*. For apart from that question, as we view the evidence we think that *the action of the trial court was not without support in the record*" (emphasis supplied)). *See also Hiltgen v. Sumrall*, 47 F.3d 695, 703 (5th Cir. 1995) ("We will reverse the trial court's denial of a motion for a new trial only when there is a clear showing of an abuse of discretion. . . . To show an abuse of discretion the defendant would have to show an absolute absence of evidence to support the jury's verdict.") (citations and internal

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44 (...continued)
Verdicts, 1989 Wis. L. Rev. 237, 320 n.318, 329-33, n. 376 ("Schnapper"). For example, in reducing as "flagrantly extravagant" $112,000 for unconstitutional strip search, the court of appeals in *Joan W. v. City of Chicago*, 771 F.2d 1020, 1021-25 (7th Cir. 1985), neglected to mention numerous critical facts set out in the written opinion of the district judge upholding the verdict, Memorandum Opinion and Order, May 22, 1984, No. 83 C 327 (N.D. Ill.), including the nature of the body cavity search, the aggressiveness and hostility of the matrons conducting the search, and the "highly insulting and antagonistic manner" used by the City's attorney in cross-examining plaintiff. *See also* Schnapper, *supra*, 1989 Wis. L. Rev. at 325-27, *comparing Deackle v. John Graham & Sons*, 756 F.2d 821, 827-32 (11th Cir. 1985) (ordering conditional remittitur based on re-calculation of plaintiff's future earnings over a thirty-six year period without accounting for merit or seniority increases and without adjusting for inflation) *with Neese v. Southern Ry.*, 350 U.S. 77 (1955), *rev'g, Southern Ry. v. Neese*, 216 F.2d 772, 775-76 (4th Cir. 1954) (similarly flawed recalculation of future earnings reversed by Supreme Court).

As Justice Black recognized, "[o]ur duty to preserve this one of the Bill of Rights may be peculiarly difficult for here it is our own power which we must restrain." *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J. dissenting).

quotation marks omitted); *Collins v. Seaboard Coast Line R.R.*, 675 F.2d 1185, 1197 (11th Cir. 1982) (same); *Harris v. Zurich Ins. Co.*, 527 F.2d 528, 530 n.1 (8th Cir. 1975) (same). *Cf. Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (in conducting sufficiency of the evidence review "[o]nly when there is a *complete absence of probative facts to support the conclusion reached* does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, . . . [t]he appellate court's function is exhausted, . . . it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (emphasis supplied)).

Accordingly, to assess whether the trial court abused its discretion, the appellate court need only determine whether any evidence was presented at trial which supports the jury's findings. An appellate court may not re-weigh conflicting evidence and substitute its assessment of that evidence for the jury's; it is in no position -- as a matter of constitutional law or practical reality -- to re-evaluate the credibility and persuasiveness of witnesses it never saw nor heard.[45]

In this case, the presence of evidence at trial supporting the jury's finding on damages is undeniable. At the close of trial, the jury was instructed to consider: "the content and subject matter of the lost slides;" the "ability[,] experience and knowledge of the photographer;" the "reputation of the photographer;" the "prior licensing fees collected"; the "nature of his efforts to exploit the economic value of [the] transparencies;" the "nature of the demand in the market for the use of pictures of this particular type and content;" the "potential competition or alternative sources of similar

[45] In this context, abuse of discretion review also requires that the discretion be exercised in the first instance by the district court. An appellate court having found an abuse of discretion in the denial of a new trial motion may not proceed to set a specific remittitur; it must remand to the district court to make that determination in light of the appellate court's analysis of the new trial issue. Assessing a particular amount of remittitur invites and requires a detailed evaluation of the evidence at trial -- an evaluation the trial judge is uniquely qualified to conduct.

or substitute photography;" the "potential use of the slides for the purposes of writing a book;" and "the entire bundle of rights involved in the photographs . . . [including] the life of the copyright." App. 304-06.

Over a three-day period, the jury and Judge Brieant saw and heard evidence going to each of these factors. The "content and subject matter of the lost slides" were established by: Mr. Gasperini's testimony of the often life-threatening circumstances under which the photographs were taken during a seven-year period under conditions impossible to recreate, App. 177; a meticulous written explanation, given to the jury, of the subject matter of each one of the lost transparencies; and a video produced by the respondent that contained reproductions of the lost images.

The "ability, experience and knowledge of the photographer," as well as his "reputation," was established not only by explanations of how Mr. Gasperini used his language skills and journalistic ability to obtain particular shots, App. 150, 217, but also by the producer of *Conflict in Central America*, Susan Green, who testified that the lost transparencies were "wonderful," App. 65, by Jane Kinne, who described Mr. Gasperini as a "first class photojournalist," App. 216, by photo editor William Kuebler, who described Mr. Gasperini's work as of the highest quality in the industry, App. 208, and even by the Center's President, William Goodman, who sought out Mr. Gasperini's work because he was the only photographer the Center knew who had collected a body of work on war in Central America. App. 122. Moreover, the jurors themselves were able to judge Mr. Gasperini's abilities by viewing the videotape reproductions of a third of his lost transparencies, Pl. Ex. 10; App. 46-47, and by reviewing numerous examples of Mr. Gasperini's photographs taken in other parts of the world. Pl. Ex. 18; App. 153-57.

The jury also heard evidence that, although during his seven-year period in Central America Mr. Gasperini was engaged in creating photographs rather than marketing them, he had earned approximately $10,000 from photography while in Central America, App. 178, 181-2, 192, 194-5; that there was a demand in the

market for images of the "type and content" of Mr. Gasperini's, *e.g.*, App. 239; that Mr. Gasperini had specific plans to market a book featuring his best work from the now lost transparencies, App. 175, 272; and that each of Mr. Gasperini's photographs would have had a recurrent value over the remaining 94 years of his copyright, App. 228-29, 268-69. Based on her estimation of Mr. Gasperini's ability as a photographer, the subject matter of the photographs, and of the circumstances under which they were taken, Jane Kinne valued the lost transparencies at $1500 each. App. 228. It cannot credibly be argued that the jury's finding that the transparencies were worth $1500 each had no support in the record.

Indeed, the Court of Appeals reached no such conclusion in this case. Instead, after no more than a cursory reference to Judge Brieant's denial of the new trial motion, the appellate court ignored most of the factors the jury had been instructed to consider in determining damages,[46] ignored the fact that the jury had an opportunity to see reproductions of many of the lost transparencies, reexamined a selective *part* of the evidence, and decided it was not as persuasive as the jury thought. Based on this re-weighing of part of the evidence, the Court of Appeals substituted its judgment for that of the jury.[47]

Despite this Court's pronouncements in *Browning-Ferris*, 492 U.S. at 279, *Grunenthal*, 393 U.S. at 159, and *Neese*, 350 U.S. at 78, the Second Circuit in this case never mentioned, much less

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[46] An appellate court reviewing a new trial motion must examine the evidence in light of the law as presented to the jury. *Cf. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364 (1962) (reversing Court of Appeals and reinstating jury's verdict on liability because appellate court did not consider a second basis for liability that appeared in the jury charge).

[47] Ironically, the Second Circuit acknowledged the difficulty inherent in this type of review. "We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. This case is particularly difficult, since neither we nor the jury was able to see the lost transparencies themselves. In the end, it is not our job to impose a specific award of damages -- that task is for the jury." Pet. App. 9a.

followed, an abuse of discretion standard in reviewing the trial court's denial of respondent's Rule 59 motion. Before improperly employing a standard of review based on New York State law, the Second Circuit in this case asserted that the "traditional" federal standard of appellate review is to reverse a jury's verdict for excessiveness when it "shock[s] the conscience of the court." Pet. App. 8a (citation omitted). Similarly, a number of circuits hold that a jury verdict will be overturned when it represents a "monstrous or shocking injustice."[48] *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994); *see also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2820, at 213-14 & n.25 (2d ed. 1995) (citing cases). A number of Circuits attempt to reconcile the two types of review (abuse of discretion and shocking or monstrous) by explaining that a District Judge's decision to uphold a verdict that the Circuit Court finds shocking or monstrous is an abuse of discretion. But this tautology cannot change the fact that appellate "shocks the conscience" review can only result in an improper subjective reevaluation of the facts. Phrases such as "shocks the conscience," "monstrous" or "grossly excessive," are inherently malleable and subjective. As Justice Kennedy has commented, "[a] reviewing court employing [a "grossly excessive"] formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award . . . This type of review, far from imposing meaningful, law-like constraints on jury excess, could become as fickle as the process it is designed to superintend." *TXO Production Corp. v. Alliance Resources Corp*, 113 S. Ct. 2711, 2725 (1993) (Kennedy, J. concurring in part and concurring in the judgment). *See also In re Air Crash Disaster Near New Orleans, La.* 767 F.2d 1151, 1156 (5th Cir. 1985) ("shocks the

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[48] A number of Circuits, including the Second Circuit, review the evidence to determine whether the verdict "shock[s] the conscience of the court," Pet. App. 8a, or other similar formulations. *See, e.g., Velasquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir.), *cert. denied*, 114 S. Ct. 553 (1993) (grossly excessive, inordinate, shocking to the conscience); *Trytko v. Hubell, Inc.*, 28 F.3d 715, 727 (7th Cir. 1995) ("monstrously excessive"); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580 (Fed. Cir. 1992) ("grossly excessive or monstrous.")

conscience" formula for appellate review "cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation." (citation omitted)).

Nearly all of these formulations, including the Second Circuit's,[49] can be traced back to this Court's holding in *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950), where at the very end of an opinion devoted entirely to other issues the Court stated that it "agree[d] with the Court of Appeals that the amount of damages awarded by the District Court's judgment [was] not monstrous in the circumstances of this case."[50] *Id.* at 101. The influence of this statement in shaping circuit practice and standards when exercising appellate review has been widely criticized. *See* DeParcq & Wright, *Damages under the Federal Employer's Liability Act*, 17 Ohio St. L.J. 431, 471-72 (1956) (critical of

[49] The Second Circuit in this case cites *Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989), which cites *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir. 1984), which cites *United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975), which cites *Caskey v. Village of Wayland*, 375 F.2d 1004, 1007 (2d Cir. 1967), which cites *Wooley v. Great Atl. & Pac. Tea Co.*, 281 F.2d 78, 80 (3d Cir. 1960) ("so grossly excessive as to shock the judicial conscience"), which cites *Thomas v. Conemaugh & Black Lick R.R.*, 234 F.2d 429, 434 (3d Cir. 1956), which cites *Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825, 830 n.10 (3d Cir. 1951), which cites *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950).

[50] Perhaps the word "monstrous" used by this Court in *Affolder* could be a workable formula if it were interpreted as it was originally articulated by the court in *Beardmore v. Carrington*, 2 Wils. 244, 95 Eng. Rep. 790 (C.P. 1764) ("the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush."). All mankind would presumably exclaim against a verdict if there was absolutely no evidence of any kind to support it. *See also* Schnapper, 1989 Wis. L. Rev. at 341-42 *comparing Beardmore, supra* (upholding jury verdict of 1,000 pounds [equivalent to $1 million 1988 dollars] for improper imprisonment of six days and government seizure of private papers), *with Taliferro v. Augle*, 757 F.2d 157, 159-62 (7th Cir. 1985) (setting aside verdict of $47,000 and ordering conditional remittitur of $25,000, for improper imprisonment of political dissident for several days and the destruction and seizure of plaintiff's manuscripts).

circuit court reliance on *Affolder* because "(a) the court of appeals had said nothing about the verdict as being 'monstrous' or otherwise excessive; (b) the railroad had not claimed in the Supreme Court that the damages were 'monstrous' or other wise excessive; and (c) a casual adjective in an opinion devoted to other issues seems an unusual way of overruling a long line of authorities.").

If any appellate review of jury fact-finding can be legitimate under the Seventh Amendment, such review may only take place under an abuse of discretion standard; and if "abuse of discretion" is to have any meaning, it must not allow a subjective reevaluation of the evidence by the Court of Appeals. A trial court may not be found to have abused its discretion in denying a motion for a new trial challenging the size of a jury's verdict unless there is a complete absence of evidence to support the size of the verdict.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court and the jury's verdict reinstated.

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QUESTIONS PRESENTED

1. Whether the Re-examination Clause of the Seventh Amendment prohibits federal appellate courts from reviewing jury verdicts for excessiveness.

2. Whether federal courts in diversity cases must apply state-law limits on the size of civil damage awards when reviewing jury verdicts for excessiveness.

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BRIEF FOR RESPONDENT

STATEMENT OF CASE

A. Statement of Facts

Respondent, The Center for Humanities, Inc., is a Mount Kisco, New York, family-owned company which produces educational videotapes and other materials. In 1990, respondent and petitioner, William Gasperini, entered into an agreement whereby respondent was to make an educational videotape entitled *Conflict in Central America* using petitioner's original slide transparencies. Pet. App. 3a; *see also* Joint Appendix ("J.A.") at 359-61. Petitioner thereafter delivered to respondent 300 slide transparencies from his collection of more than 5,000 photographs of Central America. J.A. 161. Upon completion of the videotape, respondent discovered that it had lost petitioner's transparencies. Pet. App. 3a.[1]

B. The District Court Proceedings

On October 19, 1993, petitioner filed an action seeking damages for his lost transparencies in the United States District Court for the Southern District of New York, predicating jurisdiction on diversity of citizenship, 28 U.S.C. § 1332. Respondent admitted liability, J.A. 61, and the trial was limited to the issue of compensatory damages.

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[1] Petitioner claimed that his mother provided an additional ten transparencies, but his mother contradicted that testimony, J.A. 136, and the jury awarded no damages relating to such transparencies.

1. *The Evidence at Trial*

Prior to trial, the district court denied respondent's motion in limine to exclude evidence concerning the purported existence of an "industry standard" of $1,500 per slide for valuing lost transparencies. *See* J.A. 328; *id.* at 19-20. In so ruling, however, the district court declared that it would be "absurd" and "outrage[ou]s" to value each of the 300 lost slides at $1,500. *Id.* at 19. "[N]o witness is going to testify that every transparency that is sold gets that price. Some obviously get more, some get less." *Id.* at 22.[2]

Petitioner focused his trial strategy on convincing the jury to calculate damages based on a $1,500 per slide industry standard.[3] His evidence consisted "largely" of testimony from his expert witness Jane Kinne. Pet. App. 3a-4a. Ms. Kinne testified that there is an industry standard of $1,500 per slide for photographs taken by "a professional photojournalist, once he has been edited," and then valued each of the lost slides at $1,500 because she had "become convinced that [Gasperini] was a professional photographer taking professional quality slides that had been professionally edited." J.A. at 227-28; Pet. App. 6a.

At the conclusion of Ms. Kinne's testimony, the district judge (out of the jury's presence) stated that "it's *incredible*

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2 The New York appellate courts have rejected the existence of any such industry standard. *E.g., Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 572, 592 N.Y.S.2d 27, 28 (1st Dep't 1993) (" . . . no such standard exists"); Pet. App. 4a-5a.

3 *See, e.g.*, J.A. 37 (petitioner's counsel's opening statement) ("At the end of this case, it will be clear to you that an industry standard exists, that the defendant corporation knew about the industry standard, and that at the very minimum Mr. Gasperini is entitled to the industry standard for the 310 photographs."); *see also id.* at 34, 299.

to me that every single one of 310 photographs is worth $1500. . . . *Nobody with any brains can believe that every single one of those [slide transparencies] is worth $1500.*" J.A. 243-44 (emphasis added).

Petitioner offered evidence that a few of his photographs depicted combat situations that he alone captured on film. Pet. App. 5a. But he did not attempt to prove that the vast majority of the photographs were unique; the photographs reflected such things as landscapes, street scenes, pastoral settings, people involved in ordinary daily tasks, or public events that were covered by other photographers.[4]

The record is also clear that petitioner had little, if any, potential of ever marketing the lost slides. Although his brief recites a long list of his employers, there is no

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4 *See, e.g.*, Pet. App. 5a; J.A. 197 (petitioner's testimony that "[u]sually there were" other photographers present when he was taking pictures, including times "when there were hundreds of journalists present"); J.A. 427, 434 (petitioner's trial exhibit describing, *inter alia*, the lost slides of "landscape shots including volcanoes; farming pastoral scenes, such as picking cotton, coffee; . . . industrial factories and workers; people engaged in daily tasks such as plowing, cooking, fishing"); J.A. 168 (petitioner's testimony that many of the lost slides consisted of "a lot of what I would call human interest pictures, pictures of people going about their business, farming, in their homes, street scenes. There were landscape shots.").

Petitioner asserts that his photographs of "major historical figures," such as former Nicaraguan President Daniel Ortega, "depicted images and scenes impossible to recreate," Pet. Br. at 2 & n.2, but petitioner testified that there were always other journalists and photographers present when he took photographs of such political figures. J.A. 197-98. Moreover, although he testified that four of his photographs had been displayed at an exhibition in 1984, J.A. 200, there is nothing in the record to support petitioner's assertion (Pet. Br. at 3) that some of the lost photographs were included in that display.

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evidence that any of these news organizations ever used any of his photographs. Indeed, petitioner conceded that his income from marketing his photographs had never been "substantial," ranging from a "few hundred dollars in a given year to a few thousand." J.A. 150-51. During the ten years preceding trial, petitioner's photographs generated income of approximately $10,000, Pet. Br. at 3, and 40% of those earnings came from payments by respondent in this case. *See* J.A. 195.[5] Although he testified that he hoped someday to write a book and illustrate it with his photographs, petitioner had neither sought nor obtained a publisher at the time of trial and offered no proof that such a book was marketable.[6]

At the close of the evidence, the district judge, out of the jury's presence, stated that "the evidence in this case is *very clear* that there is *no [$1,500] industry standard*." J.A. 280 (emphasis added). In "hindsight," the court concluded, it "probably would have been better off to have excluded" such evidence. *Id.* at 279.

2. *The Jury Instructions and Verdict*

The district court instructed the jury, *inter alia*, that "[t]he purpose of damages is to award . . . just and fair compensation for the loss," J.A. 304, and explained that the "basic measure of damages in this case" is "the fair

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5 Pursuant to their agreement, respondent paid petitioner 15% royalties from the cash receipts from sales of the videotape that used petitioner's photographs; these royalties totaled $551.68. J.A. 195. Respondent also made a payment of $3,500 to petitioner due to the poor sales of the videotape. *Id.* at 128.

6 Petitioner asserts that his "plans concerning his book were confirmed by respondent's expert." Pet. Br. at 3. In fact, the only thing respondent's expert "confirmed" was that he had been informed by respondent's counsel that petitioner claimed he intended to write a book. J.A. 272.

market value of the property lost at the time and place of the loss." *Id.* at 305.[7] The court's instructions also elaborated on the uniqueness and potential earning level factors (*see* Pet. App. 5a) that must be considered under New York law in calculating damages for lost photographs. J.A. 305; Pet. Br. at 7.

After deliberating for less than one hour, the jury announced its verdict: "We award the plaintiff [$]450,000, which is [$]1,500 each, for 300 slides." J.A. 313. Before adjourning, the district court announced, "I'm sure that it's a case which will merit the attention of the Court of Appeals for the Second Circuit." *Id.* at 314.

3. *Denial of Respondent's Post-Trial Motions*

The district court denied, without opinion, respondent's motion for a new trial or remittitur. Pet. App. 11a-12a. Despite that court's prior statements that it would be "absurd," "outrageous" and "incredible" to value each of the 300 slides at $1,500, and that "nobody with any brains" would ever do so—and even though the jury's $450,000 verdict was explicitly premised on precisely that calculation —the court refused to disturb the verdict.

C. The Court of Appeals' Decision

The Second Circuit reversed and remanded the case for a new trial unless petitioner agreed to accept a remitted award of $100,000. Observing that New York law requires consideration of the "uniqueness of the transparencies" in assessing their value, the court held that "*no reasonable jury* could have concluded . . . that each of the lost three

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7 As the district court noted, Mr. Gasperini's counsel elicited no testimony from his expert witness, Ms. Kinne, on fair market value. *See* J.A. 243. On the other hand, respondent's expert, Gilbert deMargitay, did provide such testimony. J.A. 258, 273.

hundred transparencies was equally, and significantly, original." Pet. App. 5a (emphasis added). Indeed, the court concluded that "*[g]iving Gasperini every benefit of the doubt*, there may have been as many as fifty . . . slides" that could be characterized as unique, but there was no evidence concerning the uniqueness of the remaining slides, which "depicted either generic scenes or events at which other professional photojournalists were present." *Id.* at 9a (emphasis added).

The court concluded that this lack of proof of uniqueness concerning most of the photographs, coupled with petitioner's "limited earning power as a photographer"—the other principal relevant factor under New York law—made the $450,000 award a "winning lottery ticket," providing Mr. Gasperini with a "financial windfall." *Id.* at 6a. The court pointed out that the "*only evidence*" of Mr. Gasperini's earning potential was that "commercial use of Gasperini's photographs yielded income of slightly more than $10,000" during the prior ten-year period. *Id.* at 5a (emphasis added). Moreover, "Gasperini did not even earn his living with his camera, and there was *no evidence* presented that he would do so in the future." *Id.* at 5a (emphasis added). And, "there was *no evidence* that Gasperini had found, or would have been able to find," a publisher for the book he planned to write on Central America, "much less that the volume would have earned him significant income." *Id.* at 6a (emphasis added).

The court also held that, as a matter of New York law, Ms. Kinne's expert testimony could not substitute for proof of uniqueness and earning potential. Ms. Kinne's categorical valuation of each and every lost transparency at $1,500 "said a lot about the alleged industry standard and *virtually nothing* about either uniqueness or earning level." *Id.* (emphasis added). The court held that "New York law does not countenance such a methodology." *Id.*

"This being a diversity case," the court explained that it was "bound to follow" New York's state-law standard of excessiveness, which provides that an award is excessive if it "'deviates materially from what would be reasonable compensation.'" Pet. App. 8a (quoting N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995)). The court carefully canvassed New York state appellate decisions "addressing awards of damages for lost transparencies" and discovered a "clear pattern" that demonstrated that the $450,000 verdict "exceeded" the "outer bounds of what a jury may reasonably award" under New York law in this case. Pet. App. 7a, 9a.

"*Drawing all reasonable inferences in favor of Gasperini*," the court held that "any award totalling more than $100,000 would exceed reasonable compensation." *Id.* at 9a (emphasis added). Accordingly, the court set aside the $450,000 judgment as "excessive under New York law," and ordered a new trial "unless Gasperini acquiesces to an award of $100,000." *Id.* at 3a, 10a.

SUMMARY OF ARGUMENT

Granting petitioner the benefit of every doubt and drawing all permissible inferences in his favor, the court of appeals analyzed the jury's verdict. It found "no evidence" to support several essential aspects of petitioner's claim for damages under New York substantive law and concluded that any award exceeding $100,000 would materially deviate from reasonable compensation and thereby violate New York's limit on excessive damages. Exercising supervisory authority that has existed in common-law courts for centuries, it therefore granted a new trial unless petitioner accepted $100,000 to satisfy his claim.

The Seventh Amendment preserves the "basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v.*

United States, 319 U.S. 372, 392 (1943). "[T]he rules of the common law" prevailing in 1791 were not "crystalized in a fixed and immutable system"; they were "constantly changing" and varied widely "on procedural matters among the states, and between them and England." *Id.* at 391-92. In particular, the rules regarding "sufficiency [of the evidence] to support a verdict had [not] reached any precise, much less final, form." *Id.* at 392. And this Court has not attempted to incorporate specific common-law forms into the jury trial requirement because the details of such procedures have, in any event, been obscured by the passage of time. *Id.*

The Seventh Amendment's Re-examination Clause does not prohibit federal appellate courts from reviewing excessive jury verdicts. The practice of granting a new trial or remittitur preserves the fundamental right to a jury trial, but ensures that an errant or excessive verdict does not deprive either party of its right to fair procedure. Moreover, as petitioner concedes, and as this Court held over a century ago, federal district courts are constitutionally authorized to grant new trials or remittiturs to redress excessive jury verdicts. The courts of appeals have no less authority under the Re-examination Clause. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). The purpose of appellate review is to ensure that the district court has properly performed *its* function of applying governing legal limits to the facts of the particular case. This traditional mode of appellate review, which involves a mixed question of law and fact, is perfectly consistent with the Re-examination Clause.

The "rules of the common law" authorized appellate excessiveness review. English common-law courts exercised supervisory authority over jury verdicts. Indeed, Blackstone regarded that supervision as essential to the preservation of the jury system; that "glory of the English

law" would not survive if courts were unable to correct prejudicial, inconsistent or unjust results. 3 William Blackstone, *Commentaries on the Laws of England* 391 (1768). The courts at Westminster, acting "interchangeably" (*id.* at 356) as trial judges and courts of appeal, granted new trials for a variety of reasons, including excessive verdicts. *Id.* at 387. When the first Congress enacted the Judiciary Act of 1789, it followed this practice and granted the power to grant new trials to "all" the courts of the United States. Judiciary Act of 1789, §§ 17-18, 1 Stat. 83.

The common law provided for judicial review closely analogous to federal appellate excessiveness review as it now exists in every circuit. *En banc* panels of judges at Westminster, all or most of whom had not presided over the *nisi prius* trial, decided motions for new trial based on claims of excessive damages. The function of this "court above" (Blackstone, *supra*, at 387) bears a striking resemblance to the function of the federal courts of appeals. Petitioner's contrary argument makes no historical sense. Petitioner argues that the Seventh Amendment grants excessiveness review exclusively to trial judges, authority that did *not* exist at common law, while withholding such authority from *en banc* judges examining the record, precisely the authority that *did* exist at common law.

Petitioner's argument that trial court approval was a *sine qua non* at common law for a new trial on excessiveness grounds reflects a misreading of the authorities. Any requirement of trial court approval, even assuming there was such a consistent practice, applied to new trials granted because the liability determination was against the weight of the evidence, not where the verdict was excessive.

Petitioner errs as well in his assertion that the rules of the common law prevented review of new trial rulings via writ of error. The "rule of the common law" was that the writ

of error was limited to matters in the record. The record at common law did not include a description of the evidence or rulings on new trial motions. It does now. As this Court has explained, "denial of review can no longer rest upon this [historical] ground, since the record before the appellate court has been enlarged to include a motion for new trial." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 464, 483 (1933).

Interpreting the Seventh Amendment to bar appellate excessiveness review would bring the Amendment into needless conflict with other constitutional provisions. Indeed, such a ruling, which would abolish a practice deeply engrained in the common law and federal judicial systems, would lead to significant disparities between litigation in state and federal courts, because all 50 states provide for appellate review of excessive verdicts. Where state law provides the predicate for a claim, the availability of appellate excessiveness review would depend entirely on whether the verdict was rendered in a state or federal court. The existence of such a dual enforcement scheme for state-created rights would, in turn, produce drastic unevenness in results and, inevitably, rampant forum shopping, contrary to the constitutional principles embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Abolishing appellate excessiveness review also would raise serious due process problems under *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), which emphasized that judicial review is a vital procedural check on arbitrary and extreme verdicts.

Erie also requires that federal courts apply state-law limits on the size of damage awards in diversity cases. Excessiveness standards, such as New York's "reasonable compensation" limit, are fundamental, substantive policy judgments concerning permissible recovery for violations of state law. As this Court confirmed in *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), a district court must apply these legal standards when determining whether to grant a new trial based on excessive damages, and a court of appeals must then evaluate the district court's application of state law for an abuse of discretion. This approach, followed by the Second Circuit below, not only respects state law, but also strikes the proper balance between the roles of the jury, the trial court and the appellate court under federal law.

ARGUMENT

I

THE SEVENTH AMENDMENT'S RE-EXAMINATION CLAUSE DOES NOT PROHIBIT FEDERAL APPELLATE COURTS FROM REVIEWING JURY VERDICTS FOR EXCESSIVENESS

A. The Seventh Amendment Preserves The Common-Law Jury Trial Right, Including The Power Of Courts To Supervise Jury Verdicts

The Seventh Amendment provides that, "In suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The Amendment responded to fears that the new Constitution would be construed to abolish civil juries entirely. It was designed to secure the general right to a jury trial and to remove the threat that judges would routinely supplant jury verdicts with their own findings of fact. But nothing in the text or history of the Seventh Amendment suggests that the Amendment was intended to enact a detailed code of federal civil procedure, or to limit appellate courts from exercising their full supervisory powers over district courts and juries. *See, e.g., Galloway*, 319 U.S. at 392. ("[T]he Amendment was designed to

preserve the basic institution of jury trial in only its most fundamental elements").

Petitioner argues that the Re-examination Clause of the Seventh Amendment was specifically intended to foreclose "the exercise of appellate review over issues of fact decided by a jury . . . ." Pet. Br. at 22. But there is no evidence to support that interpretation and both the text of the Re-examination Clause and its history refute it.

The Seventh Amendment's text does not remotely convey the meaning petitioner advocates. The Amendment does not distinguish among the "Court[s] of the United States," and does not, in fact, foreclose any review of facts decided by a jury. And it expressly authorizes "*any* Court of the United States" to review a jury's decision if it does so consistently with the rules of common law.

Moreover, the Framers did not intend to prescribe specifically when and how jury trials would be available, or the particular mechanisms for review of jury verdicts. Contrary to petitioner's assertions, there was no great clash between the Federalists and the Anti-Federalists as to the desirability of jury trials. For example, Hamilton, in Federalist No. 83, stated that "[t]he friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury." The Federalist No. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Disagreement was limited to two issues only: whether it was necessary to include an express guarantee of the jury trial right in the Constitution, and if so, how such a guarantee should be crafted.

Hamilton argued that an express textual guarantee was unnecessary and that the Constitution's silence regarding the right to a jury trial in civil actions was by no means an abolition of jury trials. *Id.* at 559-62. The Anti-Federalists countered that Article III specifically guaranteed a jury in

"[t]he Trial of all Crimes," and argued that the silence with respect to civil juries would be construed as a prohibition. This concern was reinforced by the grant to the Supreme Court under Article III of appellate jurisdiction as to "Law and Fact." *See* 3 *The Complete Anti-Federalist* 59-61 (Herbert J. Storing ed., 1981); *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) ("Although '[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,' the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated . . . by fear that the civil jury itself would be abolished.'") (quoting *Colgrove v. Battin*, 413 U.S. 149, 152 (1973)).

Petitioner argues that the Anti-Federalists can be said to have "won" the argument over whether the Constitution needed an explicit jury trial guarantee. Pet. Br. at 25 n.24. In that limited respect, he is correct. But with respect to the second issue, the drafting of the guarantee, both Federalists and Anti-Federalists tacitly agreed on the Seventh Amendment's very general language.

Hamilton had argued that the "great difference between the limits of the jury trial in different states" made the selection of any specific jury trial rule impossible. Federalist No. 83, *supra*, at 565. There was no universally agreed upon general rule that could be incorporated into the Constitution, and the selection of one state's standard in preference to all others was seen as unworkable. *Id.* at 565-67. Hamilton was not alone in this concern. James Iredell, for example, stated that "The States in these particulars differ very much in their practice from each other." *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788,*

at 361-62 (Paul L. Ford ed., 1968).[8] In fact, this Court has explained that the common-law rules surrounding the jury trial were not in 1791 "crystalized in a fixed and immutable system," were "constantly changing and developing," and had produced "widely divergent common-law rules on procedural matters among the states, and between them and England." *Galloway*, 319 U.S. at 391-92.

The Anti-Federalists acknowledged the strength of Hamilton's argument. The "Federal Farmer," for example, urged that, rather than a clause "of forty or fifty words" trying to set out every instance in which the jury trial right would obtain, the Framers should "establish it generally," and explained that "it is *the jury trial* we want; the little appendages and modifications tacked to it in the different states, are no more than a drop in the ocean . . . it is the substance we would save, not the little articles of form." 2 *The Complete Anti-Federalist*, *supra*, at 326-27.

Ultimately, of course, the Seventh Amendment was drafted by Madison, an arch-Federalist, who, as a co-author of the *Federalist Papers*, was presumably familiar with Hamilton's sentiments. The Amendment, including the Re-examination Clause, is responsive to Hamilton's argument concerning the great differences that existed among the states in according a jury trial, and is cast in general terms. Rather than a specific, self-defining text, the Amendment is tethered to the undefined body of "suits at common law" and "rules of the common law."

Thus, to the extent that the Anti-Federalists argued for a specific prohibition on appellate review of facts, they can

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8 As Hamilton observed, in four states there was an *automatic* right to a new trial, "till there have been two verdicts out of three on one side." Federalist No. 83, *supra*, at 566.

fairly be said to have *lost* the second argument with the Federalists. For example, Anti-Federalist proposals for an express provision by which appellate review would be "confined to matters of law only," or abolishing appeals "except on matter of law," were rejected. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 550-51 (Jonathan Storing ed., 1888). Certainly nothing in the text of the Amendment as adopted, nor in the very limited consideration given to it in the ratification process, demonstrates that the Framers had determined to preclude appellate review of jury verdicts or to impose any specific procedures concerning such review.[9]

As a consequence, this Court has consistently and repeatedly recognized that the Seventh Amendment guarantees only the substance of the jury trial right, not a particular form of jury trial or review thereof. To be sure, the Seventh Amendment precludes federal district courts and courts of appeals from re-examination of jury fact-finding other "than according to the rules of the common law" in existence in 1791, in both England and the United States. *See, e.g., Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 669 (1935) ("That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the *essential elements*

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9 As one commentator has concluded, "Nowhere in the history of the [Seventh Amendment] can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all." Edith G. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 290 (1966); *see also id.* at 318-20 (Seventh Amendment cannot be understood to embrace any particular civil practice given the widely differing state practices existing at the time of the Amendment's adoption).

recognized in this country and in England when the Constitution was adopted.") (emphasis added). But the Seventh Amendment "does not require that old forms of practice and procedure be retained." *Ex Parte Peterson*, 253 U.S. 300, 309 (1920). The Seventh Amendment was designed to "preserve the essentials of the jury trial," not "to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 490 (1935) (Stone, J., dissenting, joined by Hughes, C.J., and Brandeis and Cardozo, JJ.) (emphasis added); *see also Galloway*, 319 U.S. at 394 (the existence of conflicting and even contradictory alternatives to challenge a jury's verdict "give[s] room, not for the inference that one or the other is required but rather . . . that neither is essential"); *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 596 (1897).

Indeed, this Court in *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), upheld the federal practice of granting partial new trials as consistent with the Seventh Amendment, even though that practice was unknown at common law. In doing so, the Court declared: "we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance." *Id.* at 498.

B. The Re-examination Clause Does Not Prohibit Federal Appellate Excessiveness Review

1. Appellate Excessiveness Review Does Not Implicate The Re-examination Clause

An historical analysis of the "rules of the common law" regarding appellate excessiveness review is unnecessary if such review does not, in the first instance, implicate the Seventh Amendment's Re-examination Clause. In fact, traditional appellate supervision over excessive jury verdicts

is not the sort of "re-examination" of "fact tried by a jury" that the Seventh Amendment addresses.

The debate surrounding the Seventh Amendment's ratification reveals that the Re-examination Clause had a narrow and specific purpose: to preclude judges from nullifying the substance of the right to a jury trial. "It is only where the appellate court may reverse on the facts and then proceed to a final determination of the case that trial by jury has been destroyed." William W. Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936). This concern that judges might render the jury trial right a sham by deciding factual matters themselves is not at all implicated by an appellate decision to grant a new trial. "If [the district judge] has erroneously refused to grant a new trial a reversal means a new trial before another jury." *Id.* at 131.[10]

Moreover, petitioner concedes that federal district courts are empowered "to review [damage] award[s] for excessiveness . . . and to award remittitur where appropriate." Pet. Br. at 10; *id.* at 38. Petitioner's concession that the Re-examination Clause is no

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[10] Petitioner's insistence that appellate excessiveness review will eviscerate the jury trial right is particularly misguided in light of this Court's statements in *Tull v. United States* that "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial," and that it had "been presented with no evidence" that the Framers intended that result. 481 U.S. at 426 n.9. In the absence of an express right to a jury trial of the amount of damages, it is hard to see how the language of the Seventh Amendment can be interpreted to render appellate courts powerless "to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded." Pet. App. 9a.

impediment to such judicial review of an excessive verdict is fatal to his claims in this Court. The Seventh Amendment does not, as a textual matter, distinguish between trial and appellate courts of the United States. "[I]f, as concededly is the case, a trial judge may set aside a verdict for excessiveness, or direct remittitur . . . without infringing the Seventh Amendment, it should follow that an abuse of discretion in failing to take such action can be reviewed on appeal without doing violence to the Amendment." *Dagnello v. Long Island R.R.*, 289 F.2d 798, 804 (2d Cir. 1961).

Nearly 30 years ago this Court flatly rejected the argument that district courts have greater powers to review jury verdicts under the Re-examination Clause than courts of appeals. In holding that federal appellate courts are authorized to grant judgment notwithstanding the verdict after a district court's denial of such relief, the Court held that "[a]s far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967).

This same reasoning defeats petitioner's Re-examination Clause argument in the case at bar. This Court held in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), that "[t]he practice [of remittitur] . . . is sustained by sound reason, and *does not, in any just sense*, impair the constitutional right of trial by jury. It cannot be disputed that the [trial] court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial, where the damages are palpably or outrageously excessive." *Id.* at 74 (emphasis added). Federal district courts have exercised that authority consistently for nearly 200 years. *See infra* pages 33-39. The courts of appeals have no less authority under the Constitution.

Both the text of the Seventh Amendment and the historical understanding of the similar roles played by federal trial and appellate courts confirm that appellate review for excessiveness is no greater intrusion on "the province of the jury," *Neely*, 386 U.S. at 322, than a district court's exercise of its unquestioned and constitutionally proper power to conduct its own excessiveness review in the first instance. Indeed, the Judiciary Act of 1789, which petitioner agrees has "'always [been] considered . . . a contemporary exposition of the highest order,'" Pet. Br. at 35 (citation omitted), provided "[t]hat *all* the said courts of the United States shall have power to grant new trials . . . for reasons for which new trials have been granted in the courts of law." § 17, 1 Stat. 83 (emphasis added). Not surprisingly, the text of the Seventh Amendment, which governs re-examination of facts "by any Court of the United States," is fully consistent with the Judiciary Act on this crucial point.

If anything, appellate excessiveness review is *less* intrusive of jury fact-finding than excessiveness review by a district court, because appellate review does not involve direct review of the jury's verdict. While appellate excessiveness review necessarily requires an application of the law to the factual record, its purpose is to supervise the district court's performance of *its* function. As the Court explained in *Browning-Ferris*, "[i]t is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion . . . for a new trial or remittitur." 492 U.S. at 278 (footnote omitted).[11]

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11 *See also* Stephen A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery*, 47 SMU L.

Nor does this indirect review involve a re-examination of fact—or, as petitioner and his *amici* repeatedly seek to characterize it, a reweighing of the evidence. *See, e.g.*, Pet. Br. at 11, 44. On the contrary, review to determine whether a damage award sustained by a district court "materially deviates from . . . reasonable compensation," Pet. App. 8a, or is "grossly excessive, inordinate, [or] shocking to the judicial conscience," *Grunenthal v. Long Island R.R.*, 393 U.S. 156, 159 n.4 (1968), requires the application of legal standards to historical fact determinations, and therefore presents a mixed question of fact and law. *See generally Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995) (discussing Court's definition of mixed questions).[12] The Re-examination Clause plainly permits federal courts to engage in this traditional form of appellate review. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (The Seventh

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Rev. 271, 325 (1994) ("In *Browning-Ferris*, the Court's consideration of remittitur may look like review of the jury, but technically it is a review of the judge's review of the jury."); Blume, *supra*, at 131 ("In form and theory the appellate court is reviewing only the decision of the judge—not the verdict of the jury.").

[12] *See Browning-Ferris*, 492 U.S. at 280 (in reviewing punitive damage award on motion for new trial, the district court "applied the proper state-law standard" of excessiveness and its decision in that regard was subject to abuse-of-discretion review on appeal); *e.g., Dagnello*, 289 F.2d at 806 ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.") (citing *Virginia Ry. v. Armentraut*, 166 F.2d 400, 407 (4th Cir. 1948)); *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726, 734 (1st Cir. 1986).

Amendment's "ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.").

In short, appellate excessiveness review does not implicate the Re-examination Clause because it does not substitute a court's decision on the facts for those of a jury, and only requires a new jury trial where the previous jury has granted a recovery excessive under governing law.

2. The Rules Of The Common Law Allowed Appellate Review Of Excessive Verdicts

Even if appellate excessiveness review constituted a "re-examination" of a jury's decision as to a "fact," such review complies with the Re-examination Clause because it is entirely consistent with judicial supervision of the fundamental elements of jury trials at common law.

a. At the time of the ratification of the Seventh Amendment, English common-law courts had full authority to review the size of jury awards. *See Honda Motor Co.*, 114 S. Ct. at 2335-36 ("English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high."); 3 William Blackstone, *supra*, at 387-88; Coleman Phillipson, *Mayne's Treatise on Damages* 576 (9th ed. 1920). The English reports contain numerous cases, dating from at least 1655, in which a reviewing court ordered a new trial on grounds that a jury award was excessive. *E.g., Wood v. Gunston*, Styl. 466, 82 Eng. Rep. 867 (K.B. 1655); *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); *Seale v. Hunter*, Lofft 28, 98 Eng. Rep. 515 (K.B. 1771); *Jones v. Sparrow*, 5 T.R. 257, 101 Eng. Rep. 144 (K.B. 1793). "The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior of the

jurors, is of a date extremely antient." Blackstone, *supra*, at 387-88. Indeed, Blackstone attributed an early precedent to Chief Justice Glynn in *Wood v. Gunston*, where a new trial was granted for excessive damages because the "notorious partiality in the jurors was a principal species of misbehavior." *Id.* at 388.[13]

The authority to order a new trial because of an excessive verdict was exercised generally by *en banc* panels of judges —panels akin to federal appellate courts—most or all of whose members had not been present at trial. Some jury trials at common law, particularly those of important cases, could be had "at the bar" before one of the common-law courts at Westminster Hall. Blackstone, *supra*, at 352; Thomas Wood, *An Institute of the Laws of England* 479 (1722). Following enactment of the Statute of Westminster 2d in 1285, however, by far the greater number of civil cases were tried at *nisi prius*. Blackstone, *supra*, at 353; William R. Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 51 (1916). Under the *nisi prius* system, trials were had throughout the country, thereby saving jurors and litigants the trouble and expense of traveling to Westminster. While all civil cases originated in one of the common-law courts at Westminster, most trials were

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13 Throughout much of this millennium, the jurors who decided cases were to rely on their own knowledge of the litigants and controversy. G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 184 (3d ed. 1954). For this reason, jury verdicts could be attacked through writ of attaint, essentially a prosecution for perjury against the jurors. *Id.;* Blackstone, *supra*, at 374-75, 402-04. With the rise of the neutral jury and the taking of evidence in the sixteenth and seventeenth centuries, attaint fell into disuse in favor of the more civilized practice of an order for new trial. Radcliffe & Cross, *supra*, at 184-85; Blackstone, *supra*, at 374-75, 389.

conducted before a *nisi prius* judge near the site of controversy.

Although many of the *nisi prius* judges were members of one of the common-law courts, they operated under an independent commission while at *nisi prius*. 1 W.S. Holdsworth, *A History of English Common Law* 281 (3d ed. 1922); Blume, *supra*, at 131; Riddell, *supra*, at 52 ("The authority of the presiding judge was not derived from his position as a judge, but from his commission."). Other *nisi prius* judges were not members of the bench at all, but other legal officers commissioned into provincial service. Riddell, *supra*, at 50-52. Each *nisi prius* judge heard whatever cases were present at the locale, regardless of the court from which the case might have originated. *Id.*; Radcliffe & Cross, *supra*, at 183-84.

Trial at *nisi prius* ended with the jury's verdict and its entry on the record in the form of a *postea*. Holdsworth, *supra*, at 281-82; Blackstone, *supra*, at 378 ("When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury."). So too ended the job of the *nisi prius* judge. Riddell, *supra*, at 53 ("But once the trial was over and the *postea* entered, the Nisi Prius judge was *functus officio*, his commission *quoad* that case exhausted, and all thereafter must be done by the court from which the record came."). The case was returned to the court at Westminster from which it originated, and all further proceedings, including review of the verdict for excessiveness via a motion for new trial, were conducted before the court *en banc*. Blackstone, *supra*, at 386-87; Holdsworth, *supra*, at 282; Radcliffe & Cross, *supra*, at 186. Even for cases tried at bar in Westminster, "application for new trial . . . was not made to the court sitting for the trial of the case or cases at Bar, but to the court sitting in term, *en banc*." Riddell, *supra*, at 57.

Motions for new trial were heard by *en banc* panels of judges, generally within the first four days of the next term. Holdsworth, *supra,* at 282; Radcliffe & Cross, *supra,* at 186-87. The *en banc* court might include the *nisi prius* judge, if the judge were a member of the court, but it often consisted entirely of judges who had not tried the case. In every case in which an *en banc* court reviewed a *nisi prius* verdict for excessiveness, all—or all but one—of the members of the court had to rely on the written report of the trial judge for an account of the evidence in the case. Holdsworth, *supra,* at 282.

Blackstone stressed the importance of this procedure in keeping the "administration of justice and conduct of trials . . . consonant and uniform," and avoiding inconsistency and confusion, because the judges' decisions would be "mutually connected and their judgments blended together, as they are interchangeably courts of appeals or advice to each other." Blackstone, *supra,* at 356. He also insisted that "where justice is not done upon one trial, the injured party is intitled to another." *Id.* at 388. The supervisory power to grant a new trial was essential to public confidence in trials by jury as a corrective device for errors made by juries in complicated cases, or resulting from surprise, hurry or "artful impressions . . . made on their minds by learned and experienced advocates." *Id.* at 390. Thus, "[g]ranting a new trial, under proper regulations, cures all these inconveniences, and at the same preserves intire and renders perfect that most excellent method of decision, which is the glory of the English law." *Id.* at 391.

There are obvious and compelling parallels between *en banc* review for excessiveness at common law, and federal practice as established by the first Congress and as practiced today. Excessiveness review was conducted in England by panels of judges, constituting a tribunal

separate from the trial judge, who in most cases were not present at the trial, and who decided the issue based on argument of counsel and review of a record of the trial proceedings. This is the functional equivalent of today's appellate review. As Blackstone explained, "if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief *in the court above*, by obtaining a new trial." Blackstone, *supra,* at 387 (emphasis added). *See also* John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of The English Civil Juror*, 32 Am. J. Legal Hist. 201, 214 (1988) ("*Nisi prius* trials were considered subordinate proceedings over which the court *en banc* could exercise special supervisory powers"). The "rules of the common law," then, allowed appellate review of a jury's decision concerning damages to the extent of permitting an order by a "court above" requiring a new trial for excessive damages.

b. Petitioner's argument that the Seventh Amendment allows excessiveness review only by the trial judge, Pet. Br. at 22, makes no historical sense. As petitioner concedes, at common law the *nisi prius* judge who had heard the evidence had no authority to order a new trial for excessive damages. Pet. Br. at 30. That decision was left to an *en banc* court in Westminster reviewing a record of the trial.

Petitioner seeks to avoid the obvious incongruity of his argument by characterizing *en banc* review at common law as a trial proceeding, because the *en banc* court ruled on the motion for new trial before entry of final judgment. Pet. Br. at 30. This argument elevates form over function. In our federal system, the judge who presides over a trial enters judgment. There is, however, no talismanic significance to this procedural nicety, which Congress could abolish by statute anytime it wished to do so. At

common law, the trial judge had no responsibility for entering judgment. Rather, it was the *en banc* court that reviewed the record, ruled on new trial motions, and entered judgment. Review of a jury verdict on the basis of the trial record by a panel of judges not present at trial is today a function of appellate judges and in substance is indistinguishable from Westminster's *en banc* review.[14]

Today's federal court system differs from the English common-law courts in much of its structure and procedure. The Seventh Amendment plainly does not require that the federal judiciary recreate the English common-law courts precisely as they existed in 1791; only that courts preserve the essence of common-law jury trials. "Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure." *Gasoline Prods.*, 283 U.S. at 498. "We are afforded but a meager and fragmentary guide if our [appellate] review is to be controlled by the Seventh Amendment, read as though it had incorporated by reference the particular details of English trial practice exhibited by the law books in 1791." *Dimick*, 293 U.S. at

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[14] Petitioner argues that "[i]t makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determinations." Pet. Br. at 30. But a district court does act as a reviewing court, and engages in "appellate" review, when it examines the record of a trial conducted by a magistrate or proceedings before a bankruptcy judge. *See* 28 U.S.C. § 636(c)(4) (1994) (describing an "*appeal* on the record to a judge of the district court" from a trial conducted by a magistrate (emphasis added); 28 U.S.C. § 158(a) (1994) (describing the jurisdiction of district courts "to hear *appeals* . . . from interlocutory orders and decrees, of bankruptcy judges.") (emphasis added).

494 (Stone, J. dissenting).[15] The fundamental point here for Seventh Amendment purposes is that the common-law rules allowed excessiveness review of a jury's damage verdict by judges who had not presided at the trial.

Petitioner and his *amici* also argue that *en banc* review of excessive verdicts at common law is not analogous to federal appellate review because, they contend, an *en banc* court at common law would not grant a new trial without certification from the judge who tried the case that the verdict was against the weight of the evidence. Pet. Br. at 30-34; Brief *Amici Curiae* of Akhil Amar, et al. and Trial Lawyers for Public Justice ("Trial Lawyers' Br.") at 14. However, petitioner and his *amici* have conflated two separate lines of historical evidence to reach this conclusion. Any requirement of certification from the trial judge applied to new trials based on a liability determination that was against the weight of the evidence. *See* cases and other authority cited in Pet. Br. at 31, Trial Lawyers' Br. at 14. There was no such requirement for new trials based on excessive damages.

Petitioner's confusion concerning these two independent bases for new trial may stem from his misinterpretation of Blackstone. In fact, Blackstone recognized the distinction. Blackstone recites numerous grounds upon which an *en*

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[15] Exacting and fulsome replication of English common-law jury trial practice would make for a strange system indeed. For example, jury service at common law was limited to males with freehold estates. Blackstone, *supra*, at 362. When deliberating, the jurors were "to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed." *Id.* at 375. And "if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." *Id.* at 376.

banc court could grant a new trial, separating each with a semicolon. Blackstone, *supra*, at 387. Blackstone describes one such basis as follows: "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith," *id.*, a new trial may be ordered. Then, following a semicolon, Blackstone lists another, separate basis: "or if they have given exorbitant damages;" (followed by "or if the judge himself has mis-directed the jury;" etc.). *Id.* Petitioner quotes these two separate grounds together, as if the trial judge's certification was a prerequisite to a new trial for exorbitant damages. Pet. Br. at 34; *see also id.* at 33 n.31 (intermingling weight of the evidence and excessive damage cases). But as a proper reading of Blackstone makes clear, such certification was not listed by Blackstone as a requirement in cases of exorbitant damages. *See also* 3 W. Blackstone, *Commentaries on the Laws of England* (with notes by Joseph Chitty) 387 n.3 (1826) (describing a verdict without or contrary to evidence as the eighth possible ground for a new trial, and excessive damages as the tenth, with no reference to the trial judge's opinion as to the latter).[16]

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[16] At least one of petitioner's *amici*, whose brief expresses the same confusion between weight-of-the-evidence and excessive damages review, has analyzed the problem more accurately elsewhere. Professor Miller's treatise *Federal Practice and Procedure* deals in separate sections with appellate "Review of Weight of the Evidence" and "Review of Size of the Verdict." C.A. Wright, A.R. Miller, M.K. Kane, *Federal Practice and Procedure* §§ 2819, 2820 (2d ed. 1995). In the former section, Professor Miller and his co-authors discuss the English common law and the certification requirement, and only in that section do they argue that the Seventh Amendment precludes appellate review. In the section on review for excessive damages, by contrast, the authors assert—correctly—that it would be "astonishing" if this Court were to find that the Seventh Amendment barred appellate review. *Id.* § 2820, p. 212.

The common-law decisions are consistent with Blackstone. There exist numerous reported decisions in which an *en banc* court ordered a new trial because damages were excessive, with no mention of any certification from, or indeed the opinion of, the trial judge.[17] In other cases, members of the *en banc* court relied on the trial judge's *report*, as it was the only description of the evidence at trial, with no apparent reliance on the trial judge's *opinion*.[18] In still others, cited by petitioner, the *en banc* court gave explicit weight to the trial judge's opinion on the matter.[19] These latter cases do not establish, however, that the *en banc* court was the rubber stamp petitioner and his *amici* imply. Indeed, petitioner cites many cases in which the *en banc* court refused to follow the trial judge's recommendation on

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[17] *E.g.*, *Ash v. Ash*, Comb. 357, 90 Eng. Rep. 526 (K.B. 1696); *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702); *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); *Seale v. Hunter*, Lofft 28, 98 Eng. Rep. 515 (K.B. 1771); *Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng. Rep. 1046 (Exch. 1796).

[18] *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766); *Gilbert v. Brutenshaw*, Lofft 771, 98 Eng. Rep. 1059 (K.B. 1774); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786).

[19] *Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685); *Redshaw v. Brook*, 2 Wils. 405, 95 Eng. Rep. 887 (K.B. 1769).

excessive damages. Pet. Br. at 34 n.33.[20] Deference to the trial judge, where it existed, is very much akin to the present federal system of appellate review of new trial rulings for abuse of discretion. *See infra* pages 43-47. Review for abuse of discretion by a federal court of appeals, or deference to the trial judge's opinion among the *en banc* courts at common law, are functionally equivalent.

c. The common law contains another analogue to federal appellate review of a trial court's excessiveness determination: the writ of error. Petitioner argues that it is the only analogue. Because the writ of error involved higher court review only of errors of law, and did not include review of new trial rulings, petitioner insists that

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[20] The *en banc* courts also declined to follow the trial judge in many cases in which the losing party moved for a new trial because the verdict was against the weight of the evidence. *See* Pet. Br. at 34 n.33. Petitioner contends that the *en banc* court would not grant a new trial in weight-of-the-evidence cases without a recommendation to that effect from the trial judge. Pet. Br. at 30-34. As noted, this common-law practice is irrelevant to the issue in this case. In any event, this practice, even assuming it was consistently followed, does not preclude federal appellate weight-of-the-evidence review under the Seventh Amendment. That the *en banc* court might require a recommendation from the trial judge before determining that the verdict was against the weight of the evidence is an understandable limitation in a system in which the reviewing court could assess evidence at trial only through the lens of the trial judge's report. This unique procedural mechanism at common law should not bind federal appellate courts that have access to an objective transcript of trial proceedings and copies of all relevant exhibits. The English common law allowed re-examination of jury verdicts to determine if they were against the weight of the evidence. The *en banc* court retained discretion to accept or reject the recommendation of the trial judge on the issue. The Seventh Amendment accordingly does not preclude such re-examination now.

the Seventh Amendment precludes federal appellate review of new trial rulings. Pet. Br. at 26-28.

Aside from the fact that the writ of error was not the only analogue to federal appellate review,[21] petitioner has misstated the "rule of the common law." The writ of error did not include review of new trial rulings in practice, but not because there was a common-law rule against such review. The common-law "rule" was that a writ of error was limited to matters in the record. Holdsworth, *supra*, at 223; Radcliffe & Cross, *supra*, at 210-11. At common law, the record consisted only of the process, the pleadings, the minutes of the clerk, the verdict, the judgment entered thereon, and the bill of exceptions (alleged legal errors noted by the parties at trial). Radcliffe & Cross, *supra*, at 211; Comment, 32 Mich. L. Rev. 387, 388 (1934). The trial judge's report of the proceedings was not part of the record, nor was the motion for new trial or ruling thereon. Radcliffe & Cross, *supra*, at 211-12; Comment, 32 Mich. L. Rev. at 388. Accordingly, it was not possible for a court on writ of error to review a jury verdict for excessiveness. *See* Radcliffe & Cross, *supra*, at 211 ("the confining of the errors alleged to errors on the record meant that appeals were *in effect* confined to matters of law") (emphasis added).

The situation has changed. The "effective" limitation of the writ of error can no longer justify a failure to provide review of a new trial ruling on appeal, this Court has

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[21] "At common law, after trial at *nisi prius*, the cause was heard by the court in banc upon a rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure." Roscoe Pound, *Principles of Practice Reform*, 71 Cent. L.J. 221, 228 (1910).

explained, because the record on appeal now includes a record of the trial proceedings and the ruling on the new trial motion. "It has been suggested that review [of a new trial ruling on the basis of excessive damages] must be denied because of the historical limitation of the writ of error to matters within the record." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 464, 482 (1933). "But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include, in the bill of exceptions, a motion for new trial." *Id.* Thus, an appellate court that rules on a new trial motion on the basis of matters within the record violates no rule of the common law.

d. In the end, it does not matter if the *en banc* panel at common law looked more like a federal appellate court than a trial court, or if the writ of error included excessiveness review. The Seventh Amendment allows re-examination of jury fact-finding "according to the rules of the common law." The common law plainly permitted re-examination of a jury's verdict to determine whether it was excessive. A federal court violates no common-law rule when it engages in such re-examination. The particular title given to the Article III court performing this review, or the procedure through which it is accomplished, is simply irrelevant. *Cf. Neely*, 386 U.S. at 324.

Appellate review of a new trial ruling on excessiveness may result in approval of the original verdict, reduction of the verdict by consent of the plaintiff, or a new trial. In none of those cases has the appellate court usurped the jury's function. "It is only where the appellate court may reverse on the facts and then proceed to a final determination of the case that trial by jury has been destroyed." Blume, *supra*, at 131.

3. Judicial Review Of Excessive Jury Verdicts Is Deeply Engrained In Common Law And The Federal Court System

Two Terms ago, this Court surveyed the history of excessiveness review and concluded that "Common law courts in the United States followed their English predecessors in providing judicial review of the size of damage awards." *Honda Motor Co.*, 114 S. Ct. at 2336-37. "Judicial review of the amount awarded [by a jury]," the Court explained, "was one of the few procedural safeguards which the common law provided against th[e] danger" of "lawless, biased or arbitrary" jury verdicts. *Id.* at 2341. Indeed, it was out of a concern that "juries sometimes awarded damages so high as to require correction" that common-law courts in the United States provided judicial review, including appellate review of the size of damage awards. *See id.* at 2336-37; *see also id.* at 2342 (Scalia, J., concurring) ("the right of review [of jury verdicts for excessiveness] was a procedure traditionally accorded at common law").

At least as early as 1803, federal courts sitting *nisi prius* recognized that judges had the power to review a jury verdict for excessiveness upon a motion for a new trial, and to require parties to remit excessive amounts or face a new trial. *Lenox v. Wilson*, 15 F. Cas. 322, No. 8247 (C.C. D.C.) (the court heard "[a] motion by the defendant on the ground of excessive damages [which was] overruled by THE COURT, on the plaintiffs' releasing the difference which was about 444 dollars."), *rev'd on other grounds*, 5 U.S. 193 (1803).

In *Blunt v. Little*, 3 F. Cas. 760, No. 1578 (C.C.D. Mass. 1822), Justice Story, sitting on circuit as a trial judge, relied upon English common law and affirmed the court's power to grant a new trial based upon excessive damages: "if it should clearly appear that the jury have

committed a gross error, or have acted from improper motives, *or have given damages excessive in relation to the injury*, it is as much the duty of the court to interfere, to prevent a wrong, as in any other case." *Id.* at 761-62 (emphasis added). Justice Story ordered that "the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages." *Id.* This Court in *Honda* relied on *Blunt* to support its conclusion that "judicial review of the size of damage awards" was available at common law. 114 S. Ct. at 2336-37.

Blunt and the practices it memorializes were by no means aberrational. In the first 100 years after the passage of the Judiciary Act of 1789, federal trial courts frequently entertained motions for new trials claiming excessiveness of verdicts. For example, there at least 73 reported decisions involving verdicts challenged as excessive during the period 1789 to 1890, and of those decisions, nearly a third resulted in a finding of excessiveness and the granting either of a new trial outright or remittitur. *See* Appendix A, *infra*.

The Circuit Courts of Appeals, almost immediately after their creation by the Evarts Act in 1891, continued the established practice of reviewing jury verdicts for excessiveness, conducting such review in the context of appeals from district court denials of new trial motions.[22]

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[22] *Southern Pac. Co. v. Rauh*, 49 F. 696, 707 (9th Cir. 1892) ("there is nothing in the proceedings to justify this court in saying that the jury were governed by passion or prejudice in fixing the damages, or that the damages are excessive."); *Southern Ry. v. Craig*, 113 F. 76, 79 (4th Cir.) (acknowledging power of excessiveness review, while noting that it would be "reluctant" to exercise that power where the trial court had left the jury's verdict intact), *cert. denied*, 187 U.S. 641 (1902); *Kentucky Distilleries & Warehouse Co. v. Lillard*, 160 F. 34, 40 (6th Cir. 1908) ("It is said . . . that the judgment is grossly excessive. . . . If the damages seem large, they are not, so far as we are permitted to judge, out of proportion to the fault."); *Kewanee Oil & Gas Co. v. Mosshamer*, 58 F.2d 711, 715 (10th Cir. 1932) ("We therefore conclude . . . that the amount of the verdict was not excessive").

Like other nineteenth century courts, the Circuit Courts of Appeals sometimes performed excessiveness review under the guise of reviewing jury verdicts for "passion and prejudice."[23]

Before and shortly after the turn of the century, this Court repeatedly endorsed judicial review and remittitur as consistent with the Constitution.[24] In *Dimick v. Schiedt*,

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[23] *See, e.g., New Orleans & C. R.R. v. Schneider*, 60 F. 210, 212 (5th Cir. 1893); *see also Honda*, 114 S.Ct. at 2337 ("because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards.").

[24] *Northern Pac. R.R. v. Herbert*, 116 U.S. 642, 646-47 (1885) ("The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the trial court. . . . The corrected verdict could, therefore, be properly allowed to stand."); *Arkansas Valley Land & Cattle Co.*, 130 U.S. 69, 74 (1889) ("The practice [of remittitur] . . . is sustained by sound reason, and does not, in any just sense, impair the constitutional right of a trial by jury."); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) ("under . . . common law, the court, upon hearing of a motion for a new trial, may in the exercise of its judicial discretion . . . order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict"); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1894) (on an objection to a remittitur ruling, this Court stated "there was no error therein, of which either party has a right to complain."); *German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 312 (1911) (affirming lower court denial of a new trial on condition of remittitur); *Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94,

293 U.S. 474 (1935), the Court expressly recognized the long tradition of excessiveness review and remittitur:

> The doctrine [of remittitur] has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving remittitur. . . the doctrine would not be reconsidered or disturbed at this late day.

Id. at 484-85. As four dissenting Justices in *Dimick* noted, federal appellate courts, including this Court, did "not hesitate[ ] to resort to the remittitur where, by its use, the necessity of a new trial could justly be avoided."[25]

In the face of all of this history, petitioner nonetheless contends that this Court's decisions spanning "at least 150 years" preclude appellate excessiveness review, Pet. Br. at 37, and his *amici* insist that this Court has so "held in at least 20 cases." Trial Lawyers' Br. at 2, 6-11. But many of the cited cases either have nothing to do with appellate

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103-05 (1914) ("the practice [of remittitur does] not in any just sense impair the right of a trial by jury").

[25] *Id.* at 496-97 (Stone, J., dissenting) (citing *Bank of Kentucky v. Ashley*, 27 U.S. (2 Pet.) 327, 329 (1829); *Phillips & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 656 (1875); *Hopkins v. Orr*, 124 U.S. 510, 514 (1888); *Washington & Georgetown R.R. v. Harmon*, 147 U.S. 571, 590 (1893); *Hansen v. Boyd*, 161 U.S. 397 (1896)).

excessiveness review,[26] or are at most ambiguous as to whether excessiveness was even an issue.[27]

Still other decisions cited by petitioner and his *amici* affirmatively *endorse* appellate excessiveness review and remittitur. In *Kennon v. Gilmer*, 131 U.S. 22 (1889), for example, this Court held that the Supreme Court of the Territory of Montana had erred when, after the trial court had denied a motion for new trial, it reduced the jury's verdict and entered a new judgment *without giving the plaintiff an option for a new trial. Id.* at 29-30. This Court reversed and remanded the case to the Supreme Court of Montana with explicit instructions that it "will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, *or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur* by the plaintiff." *Id.* at 30 (emphasis added). Thus, *Kennon*, after stating that the Seventh Amendment applied with full force to the territorial courts, *id.* at 28, explicitly authorized an appellate remittitur based upon

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[26] *See, e.g., Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 190-91 (1809); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91 (1891); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-48 (1940); *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29, 33-35 (1944).

[27] *See, e.g., Railroad Co. v. Fraloff*, 100 U.S. 24, 27 (1879) ("[t]he main contention" was that the plaintiff's own action of taking excess baggage on a passenger train constituted "a fraud . . . which should prevent *any* recovery in this action") (emphasis added); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858) (interpretation of contract terms; no mention of excessive damages); *Insurance Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 248-49 (1873) (bench trial; no mention of excessive damages).

excessive damages. *See also Hansen* v. *Boyd*, 161 U.S. 397, 410-12 (1896) (ordering conditional remittitur of that part of jury's verdict produced by erroneous jury instruction); *cf. Fairmount Glass*, 287 U.S. at 482 ("Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial.").[28]

Petitioner's assertion that the Re-examination Clause question was decided in his favor sometime during the previous century is refuted by the fact that this Court has three times granted certiorari on the issue in the past 40 years, and twice previously declined to resolve it. *See Grunenthal*, 393 U.S. at 158; *Neese v. Southern Ry.*, 350 U.S. 77 (1955). As the Court explained only a few years ago, it has "never . . . expressly" held that the Seventh Amendment precludes or permits appellate review of a denial of a motion to set aside a verdict as excessive. *Browning-Ferris*, 492 U.S. at 279 n.25. And in *Affolder v. New York C. & St. L. R.R.*, 339 U.S. 96, 101 (1950), this Court appeared to engage in excessiveness review itself, stating: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."

Appellate review of jury verdicts for excessiveness is so thoroughly engrained in our judicial heritage that nearly three decades ago this Court could state that "all 11 Courts of Appeals have held that nothing in the Seventh

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[28] While petitioner and his *amici* cite a few late nineteenth and early twentieth century cases suggesting that the Re-examination Clause might prohibit appellate excessiveness review, only two of those cases even cite the Constitution *Lincoln v. Power*, 151 U.S. 436, 437-39 (1894); *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887), and none of them can be fairly read to conclude that the Seventh Amendment precludes such review.

Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." *Grunenthal*, 393 U.S. at 158 n.3 (citing cases).

C. Petitioner's Interpretation Of The Re-examination Clause Would Create Needless Conflict Between The Seventh Amendment And Other Constitutional Provisions

The various provisions of the Constitution must be construed harmoniously whenever reasonably possible. *See, e.g., Prout v. Starr*, 188 U.S. 537, 544 (1903) ("It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."). Petitioner's interpretation of the Seventh Amendment would bring that Amendment into conflict with other constitutional provisions.

In *Erie R.R. Co. v. Tompkins*, 304 U.S. at 78, the Court announced that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any [diversity] case is the law of the State." 304 U.S. at 78. The Court recognized that "no clause in the Constitution purports to confer. . . upon the federal courts" the power to declare "federal general common law" and that the exercise of such power "invaded rights. . . reserved by the Constitution to the several states." *Id.* at 78, 80. Applying *Erie* in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Court characterized "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties" as "for that purpose, in effect, only another court of the State . . . ." *Id.* at 108-09. Therefore, "the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Id. at 109. It is beyond dispute that the *Erie* doctrine is predicated on principles of constitutional federalism.[29]

Construing the Seventh Amendment to prohibit federal appellate courts from reviewing jury verdicts for excessiveness would undermine severely the constitutional principles embodied by *Erie*. Where state-law provides the substantive predicate for a claim, jury verdicts would be subject to appellate review for excessiveness, or wholly free of such review, depending solely on whether they were rendered in state or federal courts. Even verdicts that would be plainly excessive in state court would be allowed to stand in the federal system if the district court were to deny a motion for new trial or remittitur. Thus, contrary to *Erie*, a "dual system of enforcement of state-created rights" would exist. *See Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991) (holding that under *Erie* federal appellate courts must review district court interpretations of state law *de novo*, otherwise they would create "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum").

All 50 states provide some form of appellate excessiveness review. *See Dagnello*, 289 F.2d at 799-800 n.1 (citing cases from all 50 states except Alaska, Maryland and Oregon); *Honda*, 114 S. Ct. at 2338 (citing cases from Alaska and Maryland and holding that Oregon's denial of excessiveness review of punitive damages violated due process). Denying litigants such appellate review in the

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[29] *See Felder v. Casey*, 487 U.S. 131, 151 (1988) ("[F]ederal courts are constitutionally obligated to apply state law to state claims"); *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) ("[N]either Congress nor the federal courts can. . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution").

federal system would manifestly frustrate the "twin aims of the *Erie* doctrine—'discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Salve Regina*, 499 U.S. at 234 (quoting *Hanna*, 380 U.S. at 468). Because plaintiffs "fear appellate reduction of damages," *Honda*, 114 S. Ct. at 2341 n.11, they could file in federal rather than state court solely to evade appellate review if the Seventh Amendment were held to prohibit federal appellate courts from reviewing excessive verdicts.

Interpreting the Seventh Amendment to bar appellate excessiveness review would have serious collateral consequences that would aggravate the *Erie* problem. "When courts fail to exercise responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti v. Armstrong World Indus.*, 72 F. 3d 1003, 1010 (2d Cir. 1995), *pet. for cert. pending* (U.S. No. 95-1339). As more and more excessive verdicts are left undisturbed in the federal system, more and more plaintiffs would no doubt pursue their state-law damage claims in a federal forum. *Erie* prohibits such results.

The complete absence of appellate review of jury verdicts for excessiveness that petitioner contemplates would also raise significant due process concerns by eliminating an important procedural check against arbitrary and extreme damage awards. The Court in *Honda* explained that its prior decisions in the punitive damage context "emphasized the importance of the procedural component of the Due Process Clause," stressing "the availability of *both* 'meaningful and adequate review by the trial court, *and* subsequent *appellate review.*" 114 S. Ct. at 2335 (emphasis added) (citation omitted); *see, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) (expressly recognizing that "appellate review" provides "an

additional check on the jury's or trial court's discretion" that ensures due process.); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (finding that the punitive damage award "was reviewed and upheld by the trial judge . . . *and* . . . affirmed by a unanimous decision at the State Supreme Court of Appeals" entitled the award to a strong presumption of constitutional validity) (emphasis added). And the constitutional requirement of meaningful judicial review of a damage verdict is not limited to punitive damages. As Justice Scalia explained in *TXO*, "[p]rocedural due process . . . requires, I am certain, . . . judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." 113 S. Ct. at 2727 (Scalia, J., concurring in the judgment).

Petitioner asks the Court to construe the Seventh Amendment to abolish one of the two traditional layers of judicial review that provide a vital procedural check against excessive damages. If the jury in this case had returned a verdict of $1 million, or $100 million, or $1 billion to compensate petitioner for his lost transparencies, and the district court had declined to disturb such verdicts, petitioner contends that the Re-examination Clause would prohibit the Second Circuit from granting a new trial or remittitur. Basic principles of due process foreclose any such construction of the Re-examination Clause.

II

FEDERAL COURTS IN DIVERSITY CASES MUST APPLY STATE-LAW LIMITS ON THE SIZE OF DAMAGE AWARDS WHEN REVIEWING JURY VERDICTS FOR EXCESSIVENESS

A. *Browning-Ferris*, And The Basic *Erie* Principles Upon Which It Rests, Require Application Of State-Law Excessiveness Standards In Diversity Actions

Petitioner's analysis of the proper standard of excessiveness review is predicated upon a misreading of this Court's decision in *Browning-Ferris*. Petitioner's argument is contradicted both by the language of *Browning-Ferris*, and by the very review that the Court conducted in that case.

Under *Erie*, federal courts in diversity cases are obligated to apply state substantive law. In *Browning-Ferris*, the Court was *very* clear that, in a diversity case, state law provides the standard for determining whether a jury's award of damages is excessive. The Court made this point three times in the space of three pages.

First, the Court declared that "the propriety of an award of punitive damages . . . [is a] question[ ] of state law." 492 U.S. at 278. The Court then made reference to Vermont's rule that courts may set aside punitive damage awards that are "grossly and manifestly excessive." *Id.* n.24. This language refers to punitive damages, of course, but the same reasoning applies to compensatory damages, and petitioner—who himself embraces *Browning-Ferris*—does not contend otherwise.

Second, the *Browning-Ferris* Court expressly *rejected* the petitioners' invitation, comparable to the petitioner's request here, that the Court "craft some common-law standard of excessiveness," on the ground that "these are

matters of state, and not federal, common law." *Id.* at 279. The Court explained that federal courts must "determine whether the jury's verdict is within the confines set by state law," *id.*, and that "[a]dopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons, we decline that invitation." *Id.* Third, the Court held that the district court in *Browning-Ferris* "applied the proper *state-law standard* in considering whether the verdict returned was excessive." *Id.* at 280 (emphasis added).

The *Browning-Ferris* Court's holding that state-law excessiveness standards govern in diversity actions is consistent with the Court's other decisions interpreting *Erie*,[30] and is required by the distinction between substance and procedure that guides the Court's determinations in this area. Standards governing the amounts that may be recovered in damages for breach of various societal obligations, such as New York's "reasonable compensation" standard, are fundamental policy judgments by the state concerning the nature and extent of compensation available to injured persons or, in the case of punitive damages, how severely to punish a wrongdoer for engaging in misconduct. When New York, through its legislature, determined that damage awards may not "materially deviate from reasonable compensation," it was

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30 *See, e.g., Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam) (in Seventh Amendment context, "[i]n diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law," citing *Erie)*; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 n.15 (1958) (characterizing *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), as holding that "the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established").

setting the "confines" of recovery under state law. These limits on recoverable damages arising from violations of state-created tort or contract rights unquestionably are "bound up with the definition of the rights and obligations of the parties," *Byrd*, 356 U.S. at 536, and therefore are "matters of state, and not federal, . . . law." *Browning-Ferris*, 492 U.S. at 279.

Despite the clear statements concerning the applicability of state law in *Browning-Ferris*, petitioner focuses on that portion of the Court's opinion that discusses the *procedures* by which the federal courts are to implement state-law excessiveness standards in diversity actions. *See* Pet. Br. at 13, 17. But petitioner has misconstrued this aspect of *Browning-Ferris*. Although the Court stated that "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals," *id.* at 278-79, this statement referred only to the procedures for granting new trials and conducting appellate review, not the applicable standard of excessiveness.[31] Petitioner argues that this passage precludes application of state-law excessiveness standards in

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31 In support of this statement, the Court cited *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977), and 6A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice*, ¶ 59.04[1] (2d ed. 1987). Neither authority supports petitioner's interpretation of *Browning-Ferris*. The cited section in *Moore's Federal Practice* addresses whether state or federal procedural rules concerning new trial motions govern in diversity cases. Notably, in that connection, the treatise approvingly describes *Nodak Oil Co. v. Mobil Oil Co.*, 533 F.2d 401 (8th Cir. 1976), as holding that "state law controls as to whether a verdict is excessive, but federal law controls as to whether the verdict requires a new trial." 6A *Moore's Federal Practice*, *supra*, at 59-16 n.7. And, in *Donovan*, the Court simply articulated the federal *procedural* rule that a plaintiff may not appeal from a remittitur that he has accepted. *Donovan*, 429 U.S. at 650.

diversity actions and requires application of federal standards, but the Court—in the very next paragraph—explicitly *refused* to create a federal excessiveness standard precisely because state law governs that issue. *Id.* at 279.

The *Browning-Ferris* Court itself succinctly explained how the judicial review process works: "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." *Id.* at 279. Even though it was "not clear" that the Second Circuit in *Browning-Ferris* had applied the abuse-of-discretion standard, the Court affirmed the punitive damage award because it was "convinced" that the court of appeals had correctly upheld the district court's decision that the award did not violate the "*state-law standard*" of excessiveness. *Id.* at 280 (emphasis added).

Thus, while judicial review of damage awards in diversity cases "involves questions of both state and federal law," *id.* at 278, *Browning-Ferris* draws a distinct line between the two. State law excessiveness standards must be applied by the district court pursuant to *Erie*, and then the district court determines, as a federal procedural matter, what to do if state law has been violated, *i.e.*, "whether a new trial or remittitur should be ordered." *Id.* at 279. The court of appeals then reviews the district court's determination for abuse of discretion. And, in making that determination, the appellate court necessarily must apply the state-law excessiveness standard to evaluate the correctness of the district court's judgment.

This carefully balanced approach gives full weight to state law in diversity actions, and respects the proper provinces of jury, trial court and appellate court. It also serves both of *Erie's* primary goals: achieving substantial uniformity between cases tried in a federal court and cases tried in the courts of the state in which the federal court sits, and minimizing forum shopping.

Accordingly, despite petitioner's claim of support from *Browning-Ferris*, he has ignored the extent to which that decision expressly invoked state-law standards of excessiveness as part of federal appellate review. The legal regime petitioner and his *amici* seek to impose would disregard state law and *Erie*, and would require federal courts to uphold awards that are excessive under state law and that would be struck down in "a State court a block away." *Guaranty Trust*, 326 U.S. at 109. Such a system would soon lead to a substantial displacement of state substantive law, contrary to *Erie*, and plainly foster forum shopping.

B. The Second Circuit Engaged In The Proper Mode Of Review In This Case

The Second Circuit's review of the district court's decision to deny a motion for a new trial in this case was fully consistent with the *Browning-Ferris* blueprint.

Despite its repeated statements that a verdict valuing each of the lost transparencies at $1,500 would be irrational, the district court, without opinion or comment, denied respondent's motion for new trial or remittitur. The district court's failure to explain the disparity between its express sentiments and its inaction made it all the more necessary for the Second Circuit to perform its appellate function,

ensuring that the district court had fulfilled its duty to apply state law.[32]

Consistent with *Browning-Ferris*, the court of appeals evaluated the district court's action through the prism of the applicable state-law standard of excessiveness. Pet. App. 8a ("This being a diversity case, we are bound to follow the standard set forth in the New York statute."). That standard requires a judicial determination whether "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). Enacted as part of a larger package of tort reform measures, this statute reflects the settled judgment of the people of New York on an important question of policy. The reasonable compensation standard "is quite clearly a substantive rule governing the allowable size of jury verdicts." *Consorti*, 72 F.3d at 1012 n.8.[33]

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32 In *Fairmount Glass*, the Court suggested that where, as here, the trial judge expressly criticizes the verdict on the record, yet refuses to grant a new trial, that refusal might be "held erroneous as a matter of law." 287 U.S. at 485 & n.12.

33 Petitioner argues that the Second Circuit went beyond application of state substantive law and held that "state law also provides the appellate standard for reviewing the jury's findings of fact." Pet. Br. at 8. What petitioner characterizes as the state's "appellate standard," however, *is* the state substantive standard: New York's policy decision that damage awards are to be restrained by the concept of "reasonable compensation." And that standard's application is not just limited to appeals—it applies with equal force when New York state trial judges review damage awards for excessiveness. *See, e.g., Inya v. Hyundai, Inc.*, 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994); *Wendell v. Supermarket Gen. Corp.*, 189 A.D.2d 1063, 1064, 592 N.Y.S.2d 895, 896 (3d Dep't 1994); *Ramos v. City of New York*, 169 A.D.2d 687, 565 N.Y.S.2d 68, 69 (1st Dep't 1991).

In applying New York's law, the Second Circuit respected the traditional relationships among federal juries, trial courts and appellate courts. The court first applied New York's excessiveness standard ("Applying this standard, we conclude that the jury's award of $450,000 to Gasperini materially deviates from what is reasonable compensation"), and *then* proceeded to review the district court's decision, through the traditional, deferential federal abuse-of-discretion standard (acknowledging the role of the jury and giving "every benefit of the doubt" and "[d]rawing all reasonable inferences" in favor of petitioner). Pet. App. at 8a-9a. The court of appeals plainly did not permit the state statute to "control" (Pet. Br. at 18) the procedural elements of federal appellate review.[34]

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34 Petitioner argues that the Second Circuit adopted the remittitur portion of New York's "state procedures," even though the Second Circuit would be prohibited from adopting New York's additur procedures. Pet. Br. at 17-18 & n.15. Petitioner may be correct that such a pick-and-choose approach to state procedure would "lead[ ] to absurdities," *id.* at 17-18, but that speculation is irrelevant. The Second Circuit did not adopt any New York procedures, either additur or remittitur. The court examined New York's *substantive* law on excessiveness, through the federal mechanism of appellate review, and ordered remittitur as a matter of federal procedure.

To dramatize his "absurdity" argument, petitioner also assumes that a federal court exercising diversity jurisdiction would not be able to apply New York's standard that prohibits "inadequate" verdicts. Pet. Br. at 18. That assumption emphasizes petitioner's confusion between state substantive law and federal procedure. Although this is not an "inadequacy" case, the Second Circuit in such a case would be able to apply the state substantive law, exercise federal review, and then, if it concluded that the district court had abused its discretion in rejecting an "inadequacy" motion, order a new trial. Thus, as in this case, state law provides the substantive standard, but federal law provides the procedure by which that standard is enforced.

While petitioner argues for "extremely deferential" review, Pet. Br. at 41, the Court in *Browning-Ferris* concluded that traditional abuse-of-discretion review provides the "proper deference" in this context. 492 U.S. at 278. Affording any greater appellate deference to district court applications of state law would contradict *Erie*. *Cf. Salve Regina*, 499 U.S. at 234.

The Second Circuit engaged in the proper mode of review here. While it did not expressly use the phrase "abuse of discretion," the court clearly concluded that the district court's judgment was a serious abuse of discretion. The court of appeals carefully studied New York state appellate decisions involving damages for lost slide transparencies and detected a "clear pattern" of awards that informed its application of the reasonable compensation standard to the facts of this case. Even after indulging "all reasonable inferences" and "every benefit of the doubt" in favor of the verdict below, the court of appeals found "no" evidence to support petitioner's claim in certain respects and ultimately decided that the verdict exceeded the "outer bounds of what damages a jury may reasonably award" under New York law. The court likened the $450,000 verdict—which was equivalent to 450 years of petitioner's prior income from his photographs—to a "winning lottery ticket" and "a financial windfall." The Second Circuit left no room for doubt that the district court abused its discretion when it upheld a verdict that "no reasonable jury" could have reached, and that the district court itself had said would be absurd, incredible and outrageous.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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APPENDIX

APPENDIX A

Bingham v. Cabot, 3 U.S. (3 Dall.) 19, 25 (1795) (motion in lower court proceeding for new trial on grounds of excessive damages denied in case of privateer against public agent to recover proceeds from goods that were captured);

Lenox v. Wilson, 15 F. Cas. 322 (C.C.D.C. 1804) (No. 8247) (motion for new trial on grounds of excessive damages overruled when plaintiffs remitted 444 dollars);

Estill v. Blakemore, 8 F. Cas. 798 (C.C.D. Tenn. 1808) (No. 4538) (motion for new trial on grounds of excessive damages denied in breach of covenant case);

Pope v. Barrett, 19 F. Cas. 1018, 1021 (C.C.D. Mass 1816) (No. 11,273) (motion for new trial on grounds of error in jury charge and excessive damages; motion granted unless plaintiff consented to remit excess);

Gray v. James, 10 F. Cas. 1019, 1020-21 (C.C.D. Pa. 1817) (No. 5719) (motion for new trial on grounds of excessive damages denied in patent infringement case);

Swann v. Bowie, 23 F. Cas. 504, 505-06 (C.C.D.C. 1820) (No. 13,672) (motion for new trial on grounds of excessive damages denied where defendant killed plaintiff's dog);

Blunt v. Little, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1578) (motion for new trial on grounds that $2,000 jury award was excessive unless plaintiff agreed to remit $500 of his damages);

Parker v. Lewis, 18 F. Cas. 1145, 1147 (Sup. Ct. Ter. Ark. 1829) (No. 10741A) (motion for new trial on grounds of excessive damages in trespass case granted where court "clearly of the opinion the damages found by the jury [were] outrageously and flagrantly excessive.");

Cushman v. Waddel, 6 F. Cas. 1077, 1078 (C.C.D.N.J. 1830) (No. 3516) (motion for new trial on grounds of excessive damages; parties settled before disposition);

Blydenburg v. Welsh, 3 F. Cas. 771, 776 (C.C.D. Pa. 1831) (No. 1583) (motion for new trial on excessive damages granted);

Thurston v. Martin, 23 F. Cas. 1189, 1190-91 (C.C.D.R.I. 1830) (No. 14,018) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Whitney v. Emmett, 29 F. Cas. 1074, 1084 (C.C.E.D. Pa. 1831) (No. 17,585) (motion for new trial on grounds of excessive damages denied in patent case);

Wiggin v. Coffin, 29 F. Cas. 1157, 1160-61 (C.C.D. Me. 1836) (No. 17,624) (motion for new trial on grounds of excessive damages granted in malicious prosecution case);

Stanley v. Whipple, 22 F. Cas. 1046, 1048 (C.C.D. Ohio 1839) (No. 13,286) (motion for new trial on grounds of excessive damages in patent case denied after court fulfilled duty to "look into the evidence.");

Alden v. Dewey, 1 F. Cas. 329, 330 (C.C.D. Mass. 1840) (No. 153) (motion for new trial on grounds of excessive damages denied in patent case);

Clark v. Ford, 5 F. Cas. 868 (C.C.D.C. 1841) (No. 2820) (motion for new trial on grounds of excessive damages denied in libel case);

Stokes v. Kendall, 23 F. Cas. 141 (C.C.D.C. 1842) (No. 13,480) (motion for new trial on grounds of excessive damages granted; verdict reinstated after plaintiff amended declaration);

Holmead v. Chesapeake & O. Canal Co., 12 F. Cas. 389 (No. 6626) (C.C.D.C. 1842) (motion for new trial on grounds of excessive damages denied);

Jones v. Van Zandt, 13 F. Cas. 1047, 1054 (C.C.D. Ohio 1843) (No. 7502) (motion for new trial on grounds of excessive damages granted);

Whipple v. Cumberland Manufacturing Co., 29 F. Cas. 934, 938 (C.C.D. Me. 1843) (No. 17,516) (motion for new trial on grounds of excessive damages denied in tort case);

Allen v. Blunt, 1 F. Cas. 450, 460-61 (C.C.D. Mass. 1846) (No. 217) (motion for new trial on ground of excessive damages denied in patent case);

Stephens v. Felt, 22 F. Cas. 1280 (C.C.S.D.N.Y. 1846) (No. 13,368) (motion for new trial in patent case denied

where jury verdict, in court's view, not "a case of palpable extravagance.");

Trigg v. Conway, 24 F. Cas. 194 (C.C.D. Ark. 1847) (No. 14,172) (motion for new trial on grounds of excessive damages and evidentiary error; new trial granted on grounds of evidentiary error);

Stimpson v. Railroads, 23 F. Cas. 103 (C.C. 3d Cir. 1847) (No. 13,456) (motion for new trial on grounds of excessive damages denied in patent case);

Aiken v. Bemis, 1 F. Cas. 229 (C.C.D. Mass. 1847) (No. 109) (motion for new trial on grounds of excessive damages in patent case and new evidence; court found damages not excessive, but granted new trial on grounds of new evidence);

Foote v. Silsby, 9 F. Cas. 373, 382 (C.C.N.D.N.Y. 1849) (No. 4916) (motion for new trial on grounds of excessive damages denied in patent case where "in [court's] judgment the damages were not excessive or unreasonable");

Battin v. Hewes, 58 U.S. (17 How.) 74, 77 (1854) (motion in first trial for new trial on grounds of excessive damages granted in patent case);

Palmer v. Fiske, 18 F. Cas. 1030, 1031 (C.C.D. Me. 1854) (No. 10,691) (motion for new trial on grounds of excessive damages denied in trespass case);

White v. Arleth, 29 F. Cas. 978, 980-81 (C.C.S.D. Ohio 1860) (No. 17,536) (motion for new trial on grounds of excessive damages denied in breach of contract case);

Wightman v. Providence, 29 F. Cas. 1177, 1179 (C.C.D.R.I. 1860) (No. 17,630) (motion for new trial on grounds of excessive damages denied in personal injury case);

Stafford v. Pawtucket Haircloth Co., 22 F. Cas. 1030 (C.C.D.R.I. 1862) (No. 13,275) (motion for new trial on grounds of excessive damages granted in patent case when court found "[l]ooking at the whole case, it is quite clear that the damages are greatly excessive.");

Johnson v. Root, 13 F. Cas. 798 (C.C.D. Mass. 1862) (No. 7409) (motion for new trial on grounds of excessive

damages as well as other grounds in patent case; verdict set aside and new trial ordered);

Warren v. Robertson, 29 F. Cas. 282 (C.C.D. Conn. 1876) (No. 17198A) (motion for new trial on grounds of excessiveness granted in tort case unless plaintiff consented to remit excess);

Sargent v. Inhabitants of Bristol, 21 F. Cas. 498, 501 (C.C.D. Me. 1876) (No. 12,363) (motion for new trial on grounds of excessive damages denied in employment case);

Waters v. Campbell, 29 F. Cas. 412, 415 (C.C.D. Or. 1877) (No. 17,265) (motion for new trial on grounds of excessive damages granted in false imprisonment case unless plaintiff consented to remit excess);

Russell v. Place, 21 F. Cas. 57, 58 (C.C.N.D.N.Y. 1871) (No. 12,161) (motion for new trial on excessive damages granted in patent case unless plaintiff agreed to remit excess);

Gibson v. Cincinnati Enquirer, 10 F. Cas. 311, 312-13 (C.C.S.D. Ohio 1877) (No. 5392) (motion for new trial on grounds of excessive damages denied in libel case);

Whitehouse v. Grand Trunk Ry., 29 F. Cas. 1033, 1038 (C.C.D. Me. 1877) (No. 17,565) (motion for new trial on grounds of excessive damages denied in negligence case);

Quigley v. Cent. Pac. R.R., 20 F. Cas. 138, 141 (C.C.D. Nev. 1878) (No. 11,510) (motion for new trial on grounds of excessive damages granted unless plaintiff remitted excess in case where defendant ejected plaintiff from train);

Harvey v. Grand Trunk Ry., 11 F. Cas. 738, 740 (C.C.D. Me. 1878) (No. 6181) (motion for new trial on grounds of excessive damages denied in breach of contract case after court's "careful examination of the whole case.");

Wood v. Ward, 30 F. Cas. 479, 482 (C.C.S.D. Ohio 1879) (No. 17,966) (motion for new trial on grounds of excessive damages denied);

Brown v. Memphis & C.R.R., 7 F. 51 (C.C.W.D. Tenn. 1881) (motion for new trial on grounds of excessive damages denied where railroad company excluded from the

female car, female whose "reputation [was] so notoriously bad");

Reiss v. North-German Lloyd, 11 F. 844, 846 (C.C.E.D.N.Y. 1881) (motion for new trial on grounds of excessive damages denied in personal injury case);

Keep v. Indianapolis & St. Louis R.R., 10 F. 454 (C.C.E.D. Mo. 1882) (motion for new trial on grounds of excessive damages denied in tort and contract case);

Rose v. Stephens & Condit Transp., 11 F. 438, 440 (C.C.S.D.N.Y. 1882) (motion for new trial on grounds of excessive damages denied in negligence case);

Gallena v. Hot Springs R.R., 13 F. 116, 125 (C.C.E.D. Ark. 1882) (motion for new trial on grounds of excessive damages in case where passenger ejected from train; motion withdrawn when plaintiff agreed to lesser amount);

Tiblier v. Alford, 12 F. 262 (C.C.E.D. La. 1882) (motion for new trial on grounds of excessive damages denied in unlawful seizure case after plaintiff consented to remittitur);

Wabash Ry. v. McDaniels, 107 U.S. 454 (1883) (motion in lower court proceeding for new trial on grounds of excessive damages denied in personal injury case);

Bierbach v. Goodyear Rubber Co., 15 F. 490, 494 (C.C.E.D. Wis. 1883) (motion for new trial on grounds of excessive damages granted in personal injuries case unless plaintiff agreed to remit excess);

Brown v. Evans, 17 F. 912, 919 (C.C.D. Nev. 1883) (motion for new trial on grounds of excessive damages denied in assault and battery case);

Malloy v. Bennett, 15 F. 371, 376 (C.C.S.D.N.Y. 1883) (motion for new trial on grounds of excessive damages granted in libel case after "a critical review of the proceedings");

Hardesty v. Pyle, 15 F. 778, 782 (C.C.W.D. Pa. 1883) (motion for new trial on grounds of excessive damages denied after "a careful consideration of the whole case");

Smith v. Memphis & L.R.R., 18 F. 304, 311 (C.C.W.D. Tenn. 1883) (motion for new trial on grounds of excessive

damages denied in case where foot crushed and permanently injured due to defective railroad track);

Frericks v. Bermes, 22 F. 424, 425 (C.C.D.N.J. 1884) (motion for new trial on grounds of excessive damages denied in personal injury case);

Philbrick v. City of Niles, 25 F. 265, 266 (C.C.W.D. Mich. 1885) (motion for new trial on grounds of excessive damages denied in personal injury case);

Clear v. Fox, 26 F. 90, 92 (C.C.E.D. Va. 1885) (motion to set aside verdict granted where judge stated that "even if [the plaintiff] had a right to some compensation, I do not think it should sound in many thousands of dollars.");

Taylor v. Rice, 27 F. 264 (C.C.D. Ind. 1886) (motion for new trial on grounds of excessive damages granted in malicious prosecution case);

Osborne v. City of Detroit, 32 F. 36, 43 (C.C.E.D. Mich. 1886) (motion for new trial on grounds of excessive damages denied in personal injury case);

Nonce v. Richmond & D. R.R., 33 F. 429, 437 (C.C.W.D. N.C. 1887) (motion for new trial on grounds of excessive damages granted in personal injury case);

Collins v. Whitehead, 34 F. 121, 123 (C.C.D. Colo. 1888) (motion for new trial on grounds of excessive damages denied in libel and slander case);

Harris v. Louisville, N.O. & T.R.R., 35 F. 116, 128 (C.C.W.D. Tenn. 1888) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Parshall v. Minneapolis & St. L. Ry., 35 F. 649, 651 (C.C.D. Minn. 1888) (motion for new trial on grounds of excessive damages denied in personal injury case);

Clarke v. American Dock & Improvement Co., 35 F. 478 (C.C.S.D.N.Y. 1888) (motion for new trial on grounds of excessive damages denied in malicious prosecution and false imprisonment case);

Cuthbert v. Galloway, 35 F. 466, 471 (C.C.S.D.N.Y. 1888) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Owens v. Baltimore & O.R.R., 35 F. 715 (C.C.S.D. Ohio 1888) (motion for new trial on grounds of excessive damages denied in insurance case);

Fotheringham v. Adams Express Co., 36 F. 252, 254 (C.C.E.D. Mo. 1888) (motion for new trial on grounds that $20,000 verdict constituted excessive award for false imprisonment case granted unless plaintiff agreed to remit $8,000);

Estill v. New York L.E. & W.R.R., 41 F. 849 (C.C.W.D. Mo. 1888) (motion for new trial on grounds of excessive damages for injuries to cattle denied if plaintiff agreed to remit excess damages in related case);

Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889) (motion in lower court proceeding for new trial on grounds of excessive damages denied in conversion case, unless plaintiff agreed to remit excess).

Shumacher v. St. Louis & S.F.R.R., 39 F. 174, 180 (C.C.W.D. Ark. 1889) (motion for new trial on grounds of excessive damages denied in negligence case);

Lund v. Hershey Lumber Co., 41 F. 202, 203 (C.C.D. Minn. 1890) (motion for new trial on grounds of excessive damages denied in negligence case);

McDonald v. Union Pac. Ry., 42 F. 579, 583-85 (C.C.D. Colo. 1890) (motion for new trial on grounds of excessive damages granted in first trial, then denied after second trial in negligence case);

Ross v. Texas Pac. Ry., 44 F. 44, 48-49 (C.C.W.D. Tex. 1890) (motion for new trial on grounds of excessive damages denied in case where child killed on railroad tracks);

Fell v. Northern Pac. R.R., 44 F. 248, 254 (C.C.D.N.D. 1890) (motion for new trial on grounds of excessive damages denied in case where plaintiff kicked off moving train).

No. 95-719

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I. THE SEVENTH AMENDMENT APPLIES TO FEDERAL COURTS SITTING IN DIVERSITY.

The Second Circuit in this case was extremely clear in articulating the standard it employed to review the district court's denial of the new trial motion. It considered itself "bound to follow the standard set forth" in N.Y. Civ. Prac. L. & R. § 5501(c), which "accords less deference to the jury's award" than does the federal standard. Pet. App. 8a. In doing so the appellate court was following its decision in *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1013 (2d Cir. 1995) (amended), which held that § 5501(c) "[u]nquestionably . . . provides the standard for appellate review" in diversity cases arising under New York law. Moreover, the *Consorti* court made clear that application of the New York standard of review, upon which it relied in "determining excessiveness and the appropriateness of remittitur," 72 F.3d at 1012, would require the appellate court to stand in the role of jurors and determine for itself what would be "reasonable" compensation:

> This standard requires the *reviewing court* to determine the range *it* regards as reasonable, and to determine whether the particular jury award deviates materially from that range, taking corrective action if it does.

Id. at 1012 (emphasis supplied). Not only did the Second Circuit in this case never suggest that it was applying a federal standard of review, the court in *Consorti* pointed out that its decision *conflicted* with those Circuits that *did* apply a federal standard of review. *See id.* at 1013 n.9 (noting conflict with, *inter alia*, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991), which held that a federal court reviewing punitive damages must apply an "abuse of discretion standard" (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989))).

Rather than defending the Second Circuit's unambiguous refusal to employ a federal standard of review, respondent makes the ludicrous claim that, while the appellate court "did not expressly use the phrase 'abuse of discretion,'" what it really meant to do was apply federal abuse of discretion review. Resp. Br. at 50. One can only conclude that respondent, like petitioner, finds the Second Circuit's failure to apply a federal standard of review indefensible.

Having declined to defend the Second Circuit's refusal to use a federal standard of appellate review in this case, respondent instead chooses to do battle with the straw person of "federal common law." Resp. Br. at 44. Federal common law has nothing to do with this case. The factors the jury was instructed to consider in determining damages, App. 304-306 (and which were largely ignored by the appellate court, Pet. Br. at 8), are determined by New York law. Moreover, the state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity.[1] Because state substantive limits on damages that do not alter the division of fact finding responsibility among the jury, trial court and appellate court are fully applicable in diversity, respondent's and its *amici's* parade of horribles concerning forum-shopping are exaggerated.

A state may also, as part of a "multi-year effort . . . for tort reform," Brief *Amicus Curiae* of the City of New York at 6, or otherwise, assign to its state appellate courts the task of re-examining the evidence presented to the jury on damages, and of reaching its own conclusion on what amount of damages would be "reasonable." A state may do this because the Seventh Amendment does not apply to state courts. A federal appellate court may not adopt this state court rule because the Seventh Amendment prevents

[1] An example of a state's elimination of recovery for a particular claim is provided by New York's law on negligent infliction of emotional distress, which disallows recovery by a bystander unless the bystander was a member of victim's immediate family. *See, e.g., Trombetta v. Conkling*, 82 N.Y.2d 549, 605 N.Y.S.2d 678 (1993). An example of a state's limitation of factors a jury may consider in determining damages is provided by New York's law on wrongful death, which provides that a jury determining damages to be awarded a family member in a wrongful death action may consider only the family member's pecuniary losses. *See* N.Y. Est. Powers & Trusts § 5-4.3 (Consol. 1995). An example of an absolute cap on damages is proved by 1995 New York Assembly Bill 6564, which would limit awards for non-economic loss in claims against public entities to $250,000. *See also Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (applying Virgin Island's statutory cap on malpractice damage recovery in diversity case); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (same).

it from reexamining facts found by a jury except "according to the rules of the common law." U.S. Const. amend. VII. *See also* Pet. Br. at 15 n.11; *Reid v. Nelson*, 154 F.2d 724, 726 (5th Cir. 1946).

This Court recognized this distinction in *Browning-Ferris*. The *Browning-Ferris* petitioners and their *amici* asked the Court to craft a federal common-law standard of "excessiveness" that would have defined the factors to be considered in determining punitive damages, such as "proportionality between punitive and compensatory damages," or "statutory penalties for similar conduct." 492 U.S. at 279. The Court declined, *id.*, having observed that the factors a jury may consider in determining the amount of damages is a matter of state law. *Id.* at 278.

This Court made *very* clear, however, that once a jury and a district court have evaluated the evidence of damages according to the factors provided by state law,[2] "the strictures of the Seventh Amendment," *id.* at 280 n.26, do not allow a federal appellate court "to review directly the award for excessiveness, or to substitute our judgment for that of the jury," *id.* at 278. Because the Second Circuit in this case did exactly that, *see infra* Point III, its decision must be reversed.

II. THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE PROHIBITS APPELLATE REVIEW OF JURY FACT FINDINGS.

Respondent's central contention is that there is *no distinction* between a trial court and an appellate court's power to reexamine jury fact findings under the Seventh Amendment. Resp. Br. at 17-18. On its face, this proposition is absurd. Respondent cannot cite a *single case* in which an appellate court asserts the same power as the trial judge to review a jury's fact findings. Careful analysis

[2] This Court in *Browning-Ferris* mentioned application of a "state-law standard in considering whether the verdict returned was excessive," 492 U.S. at 280, *only* when discussing the responsibilities of the jury and the district court. Thus, this Court held, the Court of Appeals' "conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits *juries* to consider in awarding punitive damages." *Id.* (emphasis supplied).

bears out this first impression. The language and history of the Reexamination Clause, American federal jurisprudence, and English common law demonstrate that while a trial judge may reexamine facts tried by a jury, an appellate court may not.[3]

Language and History of the Reexamination Clause. The Reexamination Clause states "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Respondent's only textual argument is that because the Reexamination Clause does not have separate provisions for trial and appellate court reexamination of jury fact findings, there is no basis to distinguish between them. Resp. Br. at 12, 17-18. But the Reexamination Clause prohibits judicial reexamination of jury fact findings except "according to the rules of the common law." Because the "rules of the common law" distinguish between trial court and appellate court review of jury fact findings, *see infra* at 10, this distinction is expressed in the Amendment's plain language.

As for legislative history, respondent simply ignores the historical record set out in petitioner's brief. *See* Pet. Br. at 22-26 & nn.19-25. Respondent does not deny the Constitution's provision for appellate review of facts was a prime motive behind the drive for the Seventh Amendment's guarantee. Resp. Br. at 13. Nor does respondent contradict that the ratifiers believed appellate review of jury fact findings was "utterly inconsistent with the principles of the

[3] Incredibly, respondent also argues that the Seventh Amendment is not implicated when an appellate court grants a new trial motion because the plaintiff gets a new jury trial. Resp. Br. at 17, 32 (relying solely on William Blume, *Review of Facts in Jury Cases – The Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936)). This novel claim is belied by the text of the Seventh Amendment, the English common law practice, and over 200 years of American jurisprudence, *see, e.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) ("facts once tried by a jury cannot be tried anew, *by a jury or otherwise*, in any court of the United States" (emphasis supplied)). Simply put, no court or commentator has ever understood the Seventh Amendment's Reexamination Clause to permit review of a jury's fact-finding provided a new trial was ordered. The Seventh Amendment right to trial by jury free from appellate court interference is not the right to have as many jury trials as it takes to find a jury that will return a verdict in keeping with an appellate court's opinion of the facts.

common law, and trials by jury." 3 *The Complete Anti-Federalist* 159 (Herbert J. Storing ed., 1981). Finally, respondent offers nothing to refute the conclusion that the Reexamination Clause was designed specifically to prevent appellate review of jury fact findings. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913); *Chicago B. & Q. R. v. Chicago*, 166 U.S. 226, 243 (1897).

Instead, respondent's analysis ignores the Reexamination Clause and denies the relevance of its legislative history. First, respondent repeatedly makes the strange argument that the Reexamination Clause only preserves the "essentials" or "substance of the jury trial right, not a particular form of jury trial or review thereof." Resp. Br. at 15, 16; *see also id.* at 11-12, 13-14. But the only authorities respondent cites to support this claim have nothing to do with the Reexamination Clause; rather they all involve the Seventh Amendment's *first clause*, which indeed merely preserves "the right of trial by jury" generally. U.S. Const. amend. VII, cl. 1.

Yet, the Seventh Amendment does more than preserve the "general right to a jury trial." Resp. Br. at 11. It is true, there is no clause in the Seventh Amendment that states "jurors shall not be allowed meat, drink, fire, or candle otherwise than according to the rules of the common law." *See* Resp. Br. at 27 n.15. But the Reexamination Clause *does* impose the "rules of the common law" as a constitutional mandate regarding judicial reexamination of jury fact findings.

Similar problems beset respondent's related argument that the "rules of the common law" referenced in the Reexamination Clause were "constantly changing," "widely divergent," and "undefined." Resp. Br. at 14 (citations omitted).[4] Again, respondent's author-

[4] Respondent's argument includes the implicit assertion that the "rules of the common law" referred to in the Seventh Amendment are not those of *English* common law, but rather the common law practice in the original thirteen states. *See, e.g.*, Resp. Br. at 14 (arguing that "great differences . . . existed among the states in according a jury trial"). This point flies in the face of this Court's repeated holding that the provision's reference to common law "had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states." *Capital Traction Co. v. Hof*, 174 U.S.

(continued...)

ities all concern other aspects of jury trials; none refers to any divergence or change or ambiguity regarding whether an appellate court could reexamine facts tried by a jury.[5] Respondent cites nothing from the ratification debates that shows the framers believed there was any variance or uncertainty in the common law on *this point*.[6]

Finally, respondent claims that although the ratifiers who pressed for the passage of the Seventh Amendment's Reexamination Clause were specifically motivated to preclude appellate review of jury fact findings, *see* Pet. Br. at 23-25 & nn.21-24, they supposedly "'won' the argument over whether the Constitution needed an explicit jury trial guarantee," Resp. Br. at 13, but "lost" the "second argument"

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[4] (...continued)
1 at 8. *Cf. Wooddell v. Int'l Brotherhood of Electrical Workers*, 502 U.S. 93, 97 (1991). This conclusion is amply supported by the historical record. For example, the guarantee of the right to jury trials found in the 1774 declaration of rights of the first Continental Congress specifically referred to "the common law of England," 1 Journals of Congress 28 (1774), as did several of the state constitutions. *See, e.g.*, N.J. Const., art. XXII (1776); Md. Const., Declaration of Rights, art. III (1776); *see also* N.Y. Const., art. XLI (1777). Likewise, the state ratifying conventions' proposals to guarantee the right to trial by jury frequently referred to the common law of England. *See, e.g.*, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1891) 328 (New York) (hereinafter "*Elliot, Debates*"); *id.* at 334-35 (Rhode Island); 2 *Elliot, Debates* 550-51 (Maryland). Thus, respondent's repeated reference to alleged "differences" among state jury trial practices is simply irrelevant. *See also* 3 *The Complete Anti-Federalist*, *supra*, at 59-60; 2 *The Complete Anti-Federalist*, *supra*, at 321.

[5] *Galloway v. United States*, 319 U.S. 372, 390-92 & nn.23-25 (1943) (no mention of appellate review of jury fact findings); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 299-317 (1966) (no claim that different practices existed regarding whether an appellate court could reexamine facts found by a jury).

[6] The ratifiers who fought for the Reexamination Clause were united in their view that at common law appellate review of jury fact findings was prohibited. *See* Pet. Br. at 23-25 & nn.21-24. Even federalists who opposed the Seventh Amendment denied the power of an appellate court to review jury fact findings at common law. *See, e.g., The Federalist* No. 81, at 551 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *cf.* 2 *Elliot, Debates* 493.

over "how such a guarantee should be crafted." *Id.* at 12, 14-15. But there was no "second argument" over the drafting of the Reexamination Clause. The antifederalists insisted on the provision as a "price of approval of the Constitution." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 725 (1973). For the antifederalists, it was sufficient to prevent appellate review of jury fact findings by referring to English common law, which they understood to provide "no appeal from the verdict of a jury, as to facts . . . ." 2 *The Complete Anti-Federalist*, *supra* at 322. The federalists simply opposed the constitutional guarantee entirely; they made no competing proposal for its language.

Respondent makes the related claim that because the Seventh Amendment was drafted by "arch-Federalist" Madison, it must not have been intended as a "self-defining text," but instead was essentially meaningless, "tethered to the undefined body of . . . 'rules of the common law.'" Resp. Br. at 14. But Madison himself said the Bill of Rights, including the Seventh Amendment, were "those most strenuously required by the *opponents* to the constitution," 1 Annals of Cong. 775 (Joseph Gales ed., 1789) (emphasis supplied), and he specifically proposed the Reexamination Clause to modify the Constitution's provision for "appellate Jurisdiction, both as to Law and Fact." *See* 1 Annals of Cong. 452, 784 (Joseph Gales ed., 1789). In essence, respondent's position requires us to believe that Madison was engaged in an elaborate ruse, pretending to meet the demands of the antifederalists, while actually drafting an empty provision that placed no restriction on appellate review of jury fact findings. Needless to say, there is little to recommend this method for interpreting our Constitution.

American Jurisprudence. Respondent ignores the prohibition on appellate review of fact findings in jury cases found in the Judiciary Act of 1789, § 22, 1 Stat. 84-85. Instead, respondent cites Section 17 of the Act, 1 Stat. 83, which states that "all the said courts of the United States shall have power to grant new trials," to argue that federal appellate courts always have possessed the same power as trial courts to review jury fact findings. *See* Resp. Br. at 9, 19. What respondent neglects to mention is that all

three federal courts created by the Judiciary Act -- the district courts, the circuit courts, and this Court -- had original jurisdiction as *trial courts*. Judiciary Act of 1789, §§ 9, 11, 13, 1 Stat. 76-77, 78, 80-81. The circuit courts and the Supreme Court also separately had appellate jurisdiction. *Id.*, §§ 11, 13, 1 Stat. 79, 81. But only in their capacity as *trial courts* could the circuit courts and this Court grant new trials.

This explains why respondent can provide an "appendix" of 73 *trial court* decisions from the circuit courts involving review of jury verdicts for excessiveness, but cannot cite a single *appeal* in either the circuit courts or this Court where the appellate court exercised such review. *See* Resp. Br. at 34 and Appendix A.[7] In fact, the "invariable practice in every . . . circuit" was that the appellate courts were prohibited from reexamining a jury's fact findings or granting a new trial. *United States v. Wonson*, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750); *see also Maddox v. Stewart*, 16 F. Cas. 361 (C.C.D.C. 1824) (No. 8,934); *Davidson v. Burr*, 7 F. Cas. 30 (C.C.D.C. 1824) (No. 3,602).[8]

As for this Court's jurisprudence, the best respondent can manage

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[7] Understandably displeased with its failure to find a single federal appellate decision prior to this century that reverses a jury verdict as being excessive, respondent changes the subject, repeatedly pointing out that federal appellate courts may grant remittitur. *See* Resp. Br. at 17-18, 35-36. It is true that federal appellate courts may grant remittitur; it is also irrelevant. The pre-20th century cases involving appellate remittitur cited by respondent involved only *legal challenges* to damage awards. *See, e.g., Hansen v. Boyd*, 161 U.S. 397, 411 (1896); *Bank of Kentucky v. Ashley*, 27 U.S. (2 Pet.) 327, 329 (1829), *cited in* Resp. Br. at 36 n.25. But appellate remittitur implicates the Reexamination Clause *only* where it is the result of a reexamination of jury fact findings.

[8] Respondent cites only two federal appellate court decisions from prior to the 20th century that mention the size of a jury verdict. *See* Resp. Br. at 34-35 nn. 22-23. Both cases were decided near the end of the 19th century, and in each case the appellate court, after considering various legal issues raised on appeal, casually stated at the end of its opinion that damages were *not* so excessive as to indicate "passion or prejudice" by the jury, thus *rejecting* any invitation to reexamine the jury's fact findings. *New Orleans & C. R. v. Schneider*, 60 F. 210, 212 (5th Cir. 1893); *Southern Pac. Co. v. Rauh*, 49 F. 696, 707 (9th Cir. 1892). On this slender reed rests respondent's claim that appellate review of jury verdicts for excessiveness is "thoroughly engrained" in our federal system. Resp. Br. at 38.

is the feeble claim that this Court "has 'never . . . expressly' held that the Seventh Amendment precludes or permits appellate review of a denial of a motion to set aside a verdict as excessive." Resp. Br. at 38. Even this modest assertion is false. Since *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830), this Court has repeatedly held that the Seventh Amendment precludes appellate review of jury fact findings, including damage awards. Pet. Br. at 35-37 & nn.35-36; Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, *et al.*, as *Amici Curiae* ("Amar Br.") at 6-11; *see also* Products Liability Advisory Council as *Amicus Curiae* ("PLAC Br.") at 13-14 (urging that *Parsons* and its progeny be overruled). Respondent does its best to distinguish these cases, but even accepting respondent's narrowing of the issue presented, it remains true that this Court has repeatedly, unambiguously held that the Seventh Amendment precludes federal appellate court review of a jury verdict for excessiveness. For example, in *New York Central & Hudson River R.R. v. Fraloff*, 100 U.S. 24 (1879), in refusing to review the denial of a new trial motion this Court said:

> No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a *less amount*. . . . [O]ur power is *restricted by the Constitution* to the determination of questions of law arising upon the record. Our authority does not extend *to a re-examination of facts which have been tried by the jury* under instructions correctly defining the legal rights of the parties.

Id. at 31 (emphasis supplied, citations omitted).[9]

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[9] *See also Lincoln v. Power*, 151 U.S 436, 437-39 (1894) (citing Reexamination Clause to hold that Court was "not permitted" on appeal to take notice of a challenge to a jury's award of damages as excessive); *Chicago, B. & Q. R. v. Chicago*, 166 U.S. 226, 242-46 (1897) (after detailed analysis of Reexamination Clause, holding that "the last clause of the seventh amendment forbids the retrial by this court of the facts tried by the jury" related to claim that damages awarded

(continued...)

Respondent tries but fails to find some support for its view that the Seventh Amendment permits appellate review of a jury's verdict as being excessive. *See* Resp. Br. at 37-38. *Hansen v. Boyd*, 161 U.S. 397, 409, 411 (1896), for example, did not involve excessiveness review at all, but instead concerned remittitur following an erroneous jury instruction, *i.e.*, a legal error. *See supra* at 8 n. 7. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-83 (1933) merely held that an appellate court may review a trial judge's denial of a new trial motion when the denial is premised on a *legal error*. And the Reexamination Clause did not apply in *Kennon v. Gilmer*, 131 U.S. 22 (1889), which involved the territorial Montana Supreme Court, *not* a "Court of the United States." *See* U.S. Const. amend VII, cl. 2.[10]

English Common Law. Respondent does not dispute that at common law all appellate review was by "writ of error," under which only questions of law, not a jury's fact finding, could be reviewed. 3 William Blackstone, *Commentaries on the Laws of England* 405-06 (1st ed. 1768) (hereinafter "Blackstone, *Commentaries*") (under writ of error, "there is no method of reversing an error in the determination of facts"). Nor can respondent cite a single English common law decision from the period of the Seventh Amendment's adoption that asserts the power of an appellate tribunal to review a jury's fact findings, or to review the denial of a

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[9] (...continued)
were inadequate).

[10] The statement in *Kennon*, 131 U.S. at 28, that the Seventh Amendment "is in full force in Montana," only refers to the Amendment's *first clause*, the general guarantee of the jury trial right, made applicable to the territories by statute. *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850) (applying Seventh Amendment's *first clause* to territory), *cited in Kennon*, 131 U.S. at 28. *Cf. Walker v. New Mexico & S.P.R.*, 165 U.S. 593, 595-96 (1897) (while "all the provisions of the seventh amendment" may not apply to the territories, by statute the general right of jury trial applies).

motion for a new trial. *See* Pet. Br. at 26-28.[11]

Instead, respondent and its *amici* fall back on the *nisi prius* system of holding jury trials in the local county before a single judge, in lieu of a trial at Westminster before the trial court's *en banc* panel. Many jury trials were still conducted "at the bar" before the entire trial court *en banc* at Westminster, in which case the trial court *en banc* would decide any new trial motion.[12] But because where the *nisi prius* system was used the motion for a new trial still would be heard by the trial court sitting *en banc* at Westminster, and not by the *nisi prius* judge sitting alone in the county, respondent argues the *en banc* trial court at Westminster was really an "analogue" or "functional equivalent" of American federal appellate courts. Resp. Br. at 25, 30.

But the English common law trial courts were not merely "analogues" to trial courts; they *were* trial courts. They had original jurisdiction. They could conduct trials, receive evidence, hear testimony and resolve disputed factual issues. Respondent suggests the only reason to think the English common law trial courts were, in fact, acting as trial courts, is that "the *en banc* court ruled on the motion for new trial before entry of final judgment."

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[11] All the English cases cited by respondent and its *amici* are *trial court* decisions. *See* Resp. Br. at 21-22; PLAC Br. at 10 & n.6. Respondent and its *amici* make the confused point that the English common law trial courts also could exercise appellate jurisdiction in some cases, apparently hoping to suggest that English common law courts would, on appeal, reexamine jury fact findings or consider motions for new trials. *See* Resp. Br. at 9; PLAC Br. at 15. But the English common law courts only reexamined jury fact findings, or considered new trial motions, when acting within their trial jurisdiction. There is a complete "absence of cases in which new trials were granted by the Court of King's Bench when it sat as a court of appeals from Common Pleas." Jerry LeMond, *Federal Review of Excessive Verdicts*, 30 Tex. L. Rev. 242, 244 & n.19 (1951).

[12] Respondent makes the misleading suggestion that when trials were held "at the bar" at Westminster before the entire *en banc* court, motions for new trial were made to a different panel of judges. Resp. Br. at 23. This is absolutely false; the same four judges who presided at the trial decided the motion for a new trial. *See Bright v. Eynon*, 1 Burr. 390, 395, 97 Eng. Rep. 365, 367 (K.B. 1757) (after trial at bar, motion for new trial "is grounded upon what must have manifestly and fully appeared to the whole Court").

Resp. Br. at 25. Actually, not only the entry of judgment, but *every* aspect of the case -- except the jury proceedings -- was conducted before the trial court sitting *en banc* at Westminster. *See* Pet. Br. at 29-30. And if the *en banc* court elected to grant a new trial, it could conduct the re-trial itself. *Leighton v. Leighton*, 1 P. Wms. 671, 24 Eng. Rep. 563 (Ex. 1720).[13]

This Court has already resolved this issue against respondent in the context of the Reexamination Clause. In *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887), the Court held: "The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The supreme court sitting at special term, and the supreme court sitting in the general term, though the judges may differ, is the same tribunal."[14]

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[13] If there is any modern "analogue" to this system, it occurs where an action is commenced, and the trial court refers a particular matter for resolution to another adjudicator. For example, 28 U.S.C. § 636(b)(1)(B) allows a district judge to designate a magistrate to conduct evidentiary hearings and to submit proposed findings of fact. But the magistrate is not empowered to enter judgment or finally resolve the case. Instead, any "such proposed findings and recommendations" may be objected to, in which case the district judge "shall make a de novo determination . . . " *Id.*, § 636(b)(1). Respondent cites 28 U.S.C. § 636(c) for the proposition that a district court "engages in 'appellate' review" when it reviews the decision of a magistrate. Resp. Br. at 26 n. 14. But the referenced subsection applies where the *entire case* has been referred to the magistrate, including *"the entry of judgment in the case."* 28 U.S.C. § 636(c)(1) (emphasis supplied). This is precisely the power the *nisi prius* judge lacked. Apparently, entry of judgment has "talismanic significance" after all. Resp. Br. at 25.

[14] In the absence of any statement by any English common law court to the effect that the *en banc* court was acting in an appellate capacity when it considered a motion for a new trial after trial at *nisi prius*, respondent is forced to rely on a sentence fragment where Blackstone appears to refer to the *en banc* court as the "court above." Blackstone, *Commentaries*, at 387. But Blackstone demonstrates that he understood the motion for a new trial as being made to a trial, not appellate court. Thus, Chapter 24 of the *Commentaries*, entitled "Of Judgment, and it's Incidents," considers "the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue," *id.* at 386, including the motion for a new trial. By contrast, Chapter 25, entitled "Of Proceedings, in the nature of Appeals," considers the writ of error. *Id.* at 402, 405.

(continued...)

Respondent's argument, then, is a bit like saying apples are "analogues" to oranges. But respondent has another problem: the English common law trial courts would grant a new trial on the ground that the verdict was excessive or against the weight of the evidence *only* if "the judge who had tried the case 'conceived the verdict to be given against the evidence.'" John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Leg. Hist. 201, 213 (1988). *See also* Pet. Br. at 31-34 & nn.30-33 (citing cases). Respondent all but concedes this point as to new trial motions based on liability, but insists "[t]here was no such requirement for new trials based on excessive damages." Resp. Br. at 27. Incredibly, respondent hangs

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[14] (...continued)

Respondent's *amicus* PLAC commits a related, albeit more egregious misreading of Blackstone. Quoting the "scholarly" opinion by Judge Edwin Holmes in *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475, 477-84 (5th Cir.) (Holmes, J., dissenting), *cert. denied*, 342 U.S. 828 (1931), respondent's amicus says "Judge Holmes cites both Blackstone and Bracton for the proposition that":

> "[n]ot only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this 'or could not decide it,' as Bracton said, 'it was **referred to a higher tribunal**.'" 187 F.2d at 479.

PLAC Br. at 10 (emphasis supplied). But in the referenced passage Blackstone was not discussing the motion for a new trial; rather, he was providing historical background to the writ of attaint, the punishment for "false verdict" used hundreds of years before the new trial motion was developed at common law. (As respondent acknowledges, the writ of attaint "fell into disuse" by the sixteenth century. Resp. Br. at 22 n.13.) In this context, Blackstone quotes Bracton, a *thirteenth century* legal commentator, who died hundreds of years before the motion for new trial was developed at common law. 3 William Blackstone, *Commentaries on the Laws of England* 1348-49 n.s (William D. Lewis ed., 1893). Even in this irrelevant context, respondent's *amicus* misconstrues the quote from Bracton. In fact, **the reference to a "higher tribunal" is a reference to God**. Thus, the quoted passage from Bracton immediately continues: "There is an oath tendered by one party to the other in court, or by the judge to a party, upon which no conviction follows, for it is sufficient that they await the vengeance of God." 3 *Bracton de Legibus et Consuetudinibus Angliae (Bracton on the Laws and Customs of England)* 342 (George E. Woodbine ed. & Samuel E. Thorne trans., 1977).

this purported liability/damages distinction on a *semi-colon* in Blackstone. *See* Resp. Br. at 27-28. Doubtless respondent is forced to such extremes because it cannot cite a single case (or scholarly authority) to support its argument.

For *both* liability *and* damages English common law courts repeatedly and explicitly stated that a new trial motion would be granted on the ground that the verdict was against the weight of the evidence only where the *nisi prius* judge so certified. Thus, in *Redshaw v. Brook*, 2 Wils. K.B. 405, 95 Eng. Rep. 887 (C.P. 1769), a new trial motion was made on the ground that damages were excessive, but Lord Chief Justice Wilmot, before whom the case was tried, said he was "not dissatisfied with the verdict." *Id.*, 95 Eng. Rep. at 888. Justice Clive, speaking for the court, said: "As my Lord Chief Justice is not dissatisfied, how can we say that these damages are too large? A rule to shew cause why there should not be a new trial was refused per totam Curiam . . . ." *Id.* *See also* Amar Br. at 14-15.[15]

Respondent cites a few cases for the proposition that the "common-law decisions are consistent with" its liability/damages distinction, Resp. Br. at 29 n.17, but these cases do not state one way or the other whether the trial court relied on the *nisi prius* judge's certification. Respondent's reliance on this silence is misplaced. For example, three of the cases do not state that trial was held before a *nisi prius* judge, which would explain why they do not mention a *nisi prius* judge's certification.[16] In contrast,

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[15] *See also Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685); *Gilbert v. Burtenshaw*, 1 Cowp. 230, 98 Eng. Rep. 1059 (K.B. 1774); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766); *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (C.P. 1763); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786).

[16] *See Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796); *Seale v. Hunter*, Lofft, 28, 98 Eng. Rep. 515 (K.B. 1771); *Ash v. Ash*, Comb., 357, 90 Eng. Rep. 526 (K.B. 1701). *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702), in describing the background of the case, states that in a prior decision a new trial was granted for excessive damages. There is no report of the prior decision, however, and no basis for concluding that it was made in the absence of the *nisi prius* judge's certification. *Chambers v. Robinson*, 2 Str. 691, (continued...)

there are several reported decisions explicitly stating "[t]he Court will not award new tryals on the jurors gainsaying their verdicts, unless the Judge before whom it was, conceived the verdict to be given against the evidence per Curiam." *Anon.*, 1 Keb. 4, 83 Eng. Rep. 775 (K.B. 1661).[17]

The simple truth is common law had a recognized method of appeal, the writ of error, which absolutely forbade appellate reexamination of jury fact findings. Pet. Br. at 26-28. Respondent insists common law appellate courts did not review jury fact findings only because it was not technologically feasible to bring the evidentiary record up for appellate review. Resp. Br. at 9-10, 29, 30n.20, 31-32. But English and American courts *could* record testimony and preserve an evidentiary record for appellate review of the facts, 3 Blackstone, *Commentaries* at 374, 390, and they did so in suits outside the common law, where no right to jury trial obtained. *See* Judiciary Act of 1789, §§ 19, 30, 1 Stat. 83, 89-90.

But while this procedure was available, federal courts, constrained by the Seventh Amendment, would not apply it to actions at common law, because "to devolve on this court such a re-examination of facts, without a trial by jury . . . would be to give it to an *unconstitutional operation*, dangerous to the trial by jury, and at times subversive of the public liberties." *Phillips v. Preston*, 46 U.S. (5 How.) 278, 289 (1847) (emphasis supplied).

III. THE SECOND CIRCUIT ENGAGED IN AN IMPERMISSIBLE REEXAMINATION OF THE JURY'S FACT FINDINGS ON DAMAGES.

Respondent attempts to avoid application of the Reexamination

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[16] (...continued)
93 Eng. Rep. 787 (K.B. 1726), happens to be the only case in this area expressly disapproved by later decisions. *See Beardmore v. Carrington*, 2 Wils. K.B. 244, 249, 95 Eng. Rep. 790, 793 (K.B. 1764) ("this case is not law").

[17] Respondent adds the disingenuous argument that there are "many cases in which the *en banc* court refused to follow the trial judge's [sic] recommendation on excessive damages." Resp. Br. at 29-30. As respondent well knows, in the cases referred to the *nisi prius* judge certified that the verdict was excessive, yet the trial court *en banc* nonetheless *denied* the new trial motion. Pet. Br. at 34 n. 33.

Clause by characterizing the review conducted by the Second Circuit as one of law rather than fact.[18] It cannot be done.

This Court has repeatedly held that assessment of damages is decidedly factual, making it peculiarly within the province of the jury. *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915) (excessive damages "involves only a question of fact, and is not open to reconsideration here"); *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887) ("motions for new trial based on . . . excessive[ness]" present "purely a question of fact, not determinable by any fixed and certain rule of law"). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("question of liability and . . . damages. . . . are questions of fact" for jury). *See also* Amar Br. at 19.[19]

Even Blume, on whom respondent heavily relies, *see* Resp. Br.

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[18] Respondent's attempt to transform issues of "fact" into "law" is "drastic in that it amounts to a direct assault on the prerogatives of fact finders." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C. L. Rev. 993, 1018 (1986). "The classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review." *Id.* at 1028. *See* Amar Br. at 18-19; *see also id.* at 20-21 (explaining why respondent's claim that substantive due process concerns require appellate review for excessiveness is unavailing).

[19] Respondent's argument that assessment of damages is not a jury question at all, Resp. Br. at 17 n.10, would indeed be news to Blackstone, who considered damage assessment as a question solely for the jury even in cases where liability was not disputed. In discussing interlocutory judgments, Blackstone wrote: "But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury." Blackstone, *Commentaries*, *supra* at 397 (emphasis in original). The factual assessment of damages is at the very heart of the Seventh Amendment. *Barry v. Edmunds*, 116 U.S. 550, 564-65 (1886) ("nothing is better settled than that in such cases . . . where no precise rule of law fixes the recoverable damages it is the peculiar function of the jury to determine the amount by their verdict"); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2348 (1994) (Ginsberg, J., dissenting) ("[i]n the early years of our Nation, . . . trial by jury was recognized as the constitutional right of parties" pursuant to the Seventh Amendment and "the assessment of 'uncertain damages' was regarded, generally, as exclusively a jury function" (citation omitted)).

at 17, 20, 23, 32, explained that "[i]t cannot be said that the question presented is a question of law. In deciding whether a jury found against the weight of the evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts." Blume, 20 J. Am. Jud. Soc. at 131. *See also* Charles A. Wright, Arthur L. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2819 at 202 (2d ed. 1995) (argument that appeals court is reviewing a question of law is "so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review" (citing *id.*)).

Respondent's argument blurs the critical distinction between judicial review of sufficiency of the evidence under Fed. R. Civ. P. 50 (judgment as a matter of law)[20] and motion for a new trial under Fed. R. Civ. P. 59 (in this case, weight of the evidence and excessiveness review). The first requires a legal determination of whether the evidence was sufficient to necessitate invoking the jury's jurisdiction over factual matters in the first instance. It requires a reviewing court to test the evidence against a legal standard of sufficiency to determine whether the case is proper for jury consideration. The second necessitates a factual determination of whether the court, having witnessed the presentation of the evidence, concurs with the jury's verdict. It requires the court to weigh the evidence presented to determine whether the facts found by the jury are correct. *See* Wright, Miller & Kane § 2531 at 302 ("The contrasts between the two motions are dramatic"; they "have wholly distinct functions and entirely different standards govern their allowance. . . . On a motion for a new trial the court may consider the credibility of witnesses and the weight of the evidence. On a motion for judgment as a matter of law, it may not."). Thus, a federal appellate court may review the disposition of a motion for judgment as a matter of law, but may not review a motion for a

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[20] The pre-1991 reference to judgment notwithstanding the verdict was changed to judgment as a matter of law, at least in part, because of the confusion it engendered by implying an impermissible judicial reassessment of jury-found facts. Notes of Advisory Committee on Rules to 1991 Amendment (the term judgment notwithstanding the verdict was removed because it was "a misleading description of the relationship between judge and jury. . . . freighted with anachronisms").

new trial challenging the verdict as against the weight of the evidence and excessive, because it would require the appellate court to reconsider and re-weigh the jury's findings of fact on damages.

Because sufficiency of the evidence review and weight of the evidence review are critically different, respondent's reliance on *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22 (1967), Resp. Br. at 18-21, is misplaced.[21] Respondent contends that, by reaffirming the long-settled proposition that district court determinations of motions for judgment as a matter of law are reviewable on appeal, this Court in *Neely* somehow conceded that the Seventh Amendment permits appellate weight of the evidence and excessiveness review. This argumen. is illogical on its face.[22]

Respondent's assertions notwithstanding, the court of appeals in this case did not, and could not,[23] review the legal question of

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[21] By claiming that "this Court flatly rejected the argument that district courts have greater powers to review jury verdicts under the Re-examination Clause than courts of appeals," Resp. Br. at 18, respondent grossly misrepresents the holding in *Neely*. Again, respondent confuses the two clauses of the Seventh Amendment. The Reexamination Clause is never mentioned in *Neely*. *Neely* held that the entry of judgment as a matter of law by an appellate court without providing the option of new trial does not offend the *first* clause of the Seventh Amendment because, as a legal matter, plaintiff was not entitled to a jury. 386 U.S. at 321-22. Respondent's understanding of the holding in *Neely* is also directly contradicted by this Court's post-*Neely* statement in *Browning-Ferris* recognizing that the Seventh Amendment constrains appellate review of new trial motions.

[22] Unconvinced by precisely the same argument respondent makes here, this Court reversed the Second Circuit's new trial order premised on excessive damages and reinstated the judgment of the district court and jury in *Grunenthal v. Long Island R.R.*, 393 U.S. 331 (1968). *See* Brief for Respondent in *Grunenthal*, No. 68-35, at 5 (arguing that the Second Circuit "applied the legal standard. . . that permits an appellate court to enter judgment *n.o.v.*, and [*Neely*] held that appellate action under this standard is not forbidden by the Seventh Amendment"); *see also id.* at 10-11 (conflating appellate j.n.o.v. sufficiency review with appellate review of excessiveness motion because the Second Circuit gave "'petitioner the benefit of every doubt' and sought 'any rational manner consistent with the evidence' to justify the verdict" (citing Second Circuit).

[23] Respondent did not make a motion for judgment as a matter of law at the close of Mr. Gasperini's case or after trial. Accordingly, it is precluded from raising
(continued...)

whether the evidence was sufficient as a matter of law to allow it to be considered by the jury in the first instance. Instead, as amply demonstrated by even a cursory review of the record, the Second Circuit reexamined, re-weighed, and recharacterized the facts in this case and substituted its judgment for that of the jury by ordering a new trial. *See* Pet. Br. at 3-9, 44-46.

After acknowledging the difficulty it faced in making its own valuation "on a cold paper record" without "being able to see the lost transparencies themselves," Pet. App. 9a, the Second Circuit reexamined the conflicting *testimonial* evidence at trial: it found unpersuasive the testimony of plaintiff's expert and implicitly credited respondent's; it found that 250 of the lost transparencies had a specific value of $100, despite the absence of any evidence in the record to support that figure; it found that 50 of the slides were unique, despite never having seen the video reviewed by the jury which contained reproductions of 110 of the lost images; it found unpersuasive the evidence of Mr. Gasperini's efforts and plans to market the slides; and found "plausible evidence" to "conclude that . . . the jury could . . . award up to $1,500" for fifty of the images. *See id.* 5a-6a, 9a; Pet Br. at 3-9, 44-46. It cannot credibly be argued that the Second Circuit did not re-weigh the evidence in setting aside the jury's fact finding in this case.

Finally, respondent's attempt to impugn the reasonableness of the jury's verdict by citing to informal comments made by Judge Brieant is unavailing.[24] The legally significant opinion of Judge

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[23] (...continued)
the legal issue of the sufficiency of the evidence for the first time on appeal. *See* Fed R. Civ. P. 50; Wright, Miller & Kane § 2536 at 329 (it "is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court").

[24] Respondent cites, for example, Judge Brieant's remark that, "its incredible to me that *every single one* of the 310 photographs is worth $1500. . ." Resp. Br. at 2-3, 5; App. 243-44 (emphasis supplied). Respondent neglects, however, to provide the context of this and other quotes which demonstrate they were made as part of an effort to encourage the parties to settle. Just prior to making these remarks, Judge Brieant exhorted the parties to settle the case, stating "I really think maybe both of you [counsel for each side] should rethink your position on
(continued...)

Brieant is contained not in off-hand comments made while urging the parties to settle, but rather in the Judge's formal decision on respondent's Rule 59 Motion. The motion was fully briefed by both parties, considered by Judge Brieant and denied. App. 318-356; Pet. App. 11a-12a. As Judge Brieant must have recognized, the jury's valuation of each transparency at an average of $1500 was supported not only by Ms. Kinne's expert opinion, but also by a plethora of other evidence, *see* Pet. Br. at 3-6, 45-46, including the testimony of *respondent's* expert Gideon DiMargitay.[25]

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court and the jury's verdict reinstated.

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[24] (...continued)
this case *and see if you can find a way to resolve it* before it goes to the jury." App. 244 (emphasis supplied). Moreover, the evidence at trial never suggested that each of the lost transparencies would earn precisely $1500. As Mr. Gasperini's expert, Jane Kinne, explained, the $1500 figure is an *average* based on the income each transparency could be expected to earn through *repeat* sales over the 94-years of Mr. Gasperini's copyright. App. 228. ("fees can range anywhere from [$]50 to $75 . . . to as [much] as $10,000. . . . You do that over and over for the life of the copyright, and the $1500 becomes a very fair and reasonable figure.") Thus, Judge Brieant's observation that every transparency would not earn exactly $1500, "[s]ome obviously get more [than $1500 and] some get less," *id.*; App. 22, is entirely consistent with the testimony offered at trial and with the jury's verdict.

[25] On direct examination, DiMargitay conceded that 47 of the 300 lost transparencies were unique and would be chosen by him if he were to publish a book on Central America. App. 273. He was then asked if he had an opinion concerning the value of the remaining 253 transparencies. In response, DiMargitay estimated that the remaining 253 slides would have earned between $150 to $200 over a ten year period. *Id.* Multiplying DiMargitay's own figures of $150 to $250 by 9.4 (the multiplier for the 94 year period of Mr. Gasperini's copyright) equals between $1410 and $1880 per transparency. Thus, respondent's own expert provided a basis for the jury to find that even the 253 transparencies that were described as of inferior value would have an earning potential of between $1410 and $1880 over the life of Mr. Gasperini's copyright. Accordingly, DiMargitay's testimony corroborated Kinne's that the $1500 figure was a "fair and reasonable" figure.

Respectfully submitted,

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No. 95-719

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM GASPERINI, *Petitioner,*

v.

THE CENTER FOR HUMANITIES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FEDERAL JURISDICTION AND LEGAL HISTORY SCHOLARS AKHIL REED AMAR, ERWIN CHEMERINSKY, DANIEL R. COQUILLETTE, ARTHUR F. McEVOY AND ARTHUR R. MILLER, AND OF TRIAL LAWYERS FOR PUBLIC JUSTICE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief is submitted by several federal jurisdiction and legal history scholars and by a national public interest law firm.[1] *Amici* have no interest in the outcome of the particular lawsuit at bar, but they have a strong interest in the proper understanding of federal jurisdiction and of the jury system in the United States.

Akhil Reed Amar is the Southmayd Professor of Law at Yale Law School, where he teaches constitutional law, federal jurisdiction and legal history, among other subjects. He has published extensively on the history surrounding the drafting and ratification of the Constitution and of the Bill of Rights, devoting significant attention to the jurisdictional framework of the federal courts and the history of the Seventh Amendment.

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Arthur F. McEvoy III holds a joint appointment as Professor of Law and Professor of History at the University of Wisconsin, Madison, and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was counsel of record on an *amicus* brief filed by legal historians on that issue which was cited by this Court in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336 n.2 (1994).

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[1] Consent letters have been filed with the Clerk of the Court.

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School, where he teaches federal civil procedure, among other subjects. He is a co-author of a leading multi-volume treatise on federal practice and procedure which contains a detailed analysis of the Seventh Amendment issue presented in this case.

Trial Lawyers for Public Justice, P.C., is a national public interest law firm, supported by over 1500 attorneys, that is devoted to representing victims of corporate and government abuse. It is dedicated to the preservation of the civil jury system for providing fair and reasonable compensation to injured persons.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether a federal appellate court may overturn, as excessive, a jury's award of compensatory damages if the court concludes that the award "materially deviates from what is reasonable compensation," Pet. App. 8a, even where a district court has considered and rejected a post-trial claim of excessiveness under Fed. R. Civ. P. 59. As the Court of Appeals explained, it was not inquiring into whether the award was reasonable, rationally supported by the evidence, or even "so excessive as to shock the conscience of the court." Pet. App. 8a. Rather, the court applied the law of New York, which accords "less deference to the jury's award." *Id.* The Court of Appeals erred in two fundamental ways.

I. In the 205 years since the adoption of the Seventh Amendment, this Court has never approved of the kind of appellate review practiced in this case. Indeed, for the first century and a half of our Nation's history, it was universally accepted that federal appellate courts lacked the authority to engage in weight-of-the-evidence review of any factual issues in jury cases, including damage awards. This Court so held in at least 20 decisions — including opinions authored by Justice Holmes and Justice Brandeis — none of which has ever been overruled. Those decisions were correct.

The Seventh Amendment bars re-examination of any fact found by a jury other than according to the rules of the common law. At common law, there was simply no appellate review of the weight of the evidence. In ordinary cases, an itinerant "*nisi prius*" justice would

travel to the county where the jurors resided in order to conduct the trial. After trial at *nisi prius* the record was returned to Westminster, where judgment was pronounced by the full trial court. Before entry of a judgment, additional review by the court was possible. A new trial could be granted only where the *nisi prius* judge certified that the verdict was against all the evidence, and succeeded in persuading his colleagues on an en banc panel at Westminster to join him in ordering such a result. A disappointed litigant could not appeal whatever decision the en banc panel made.

To permit federal courts of appeals to order new trials based on their own views of whether jury verdicts are against the weight of the evidence would permit re-examination of facts found by a jury in a way that was unknown at common law. The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury for itself such prerogative." *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 596 (1897). Indeed, the Seventh Amendment reflects a deliberate decision to restrict judicial power and particularly to limit "appellate jurisdiction over matters of fact." Hon. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 50 (1977).

II. Apart from the Seventh Amendment, there are powerful reasons for this Court to hold, as a matter of statutory interpretation, that federal appellate courts lack the authority to engage in weight-of-the-evidence review. Congress banned all such review by statute in Section 22 of the Judiciary Act of 1789. Consistent with the well-established principles that federal jurisdictional statutes are to be narrowly construed, and that all statutes should be construed where possible to avoid constitutional problems, this Court should decline to find any intent by Congress, in its 1948 revision and recodification of the Judicial Code, to lift that ban in cases tried to a jury. There is no evidence that Congress, in its 1948 streamlining of the Judicial Code, intended to overturn a century and a half of settled practice by authorizing appellate courts to review, under a weight-of-the-evidence standard, a trial judge's refusal to grant a new trial. As Judge Learned Hand observed several years later, under the 1948 Judicial Code such orders remain "not reviewable at all." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953).

A holding by this Court that appellate courts have jurisdiction (which they are required to exercise) to conduct weight-of-the-evidence review at the behest of disappointed litigants who seek a new trial would "oblige[] a reviewing court to examine in some detail all of the evidence," a "burdensome" requirement that is not warranted "where a trial judge denies a 'weight of the evidence' challenge and leaves in place a jury verdict supported by legally sufficient evidence." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 1995 U.S. App. LEXIS 35230, *53 (2d Cir. Dec. 13, 1995) (Newman, J.). This practice has virtually no utility, because appellate courts almost never force a grant of a new trial on weight-of-the-evidence grounds. Indeed, we have uncovered only eight such grants nationwide in the past decade. Nevertheless, "[s]o long as the appellate courts hold open any possibility of reversal on this ground, they invite litigants to come to them in countless cases arguing about the weight of the evidence," burdening appellate courts "for no good purpose, considering how extraordinarily rare it is that there is ever a reversal on this ground." Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2819, at 204 (2d ed. 1995) (hereinafter "Wright & Miller").

ARGUMENT

I. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT BARS FEDERAL APPELLATE COURTS FROM ENGAGING IN *DE NOVO* OR WEIGHT-OF-THE-EVIDENCE REVIEW OF ANY FACT FOUND BY A JURY

In this case, the Court of Appeals applied a New York statute providing that an appellate court "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). The statute was adopted in 1986 in order to "relax the former standard of review and to facilitate appellate changes in verdicts." *O'Connor v. Graziosi*, 131 A.D.2d 553, 554, 516 N.Y.S.2d 276, 277 (2d Dept.), *appeal denied*, 70 N.Y.2d 613 (1987). In reviewing damage awards, New York appellate courts independently review the entire trial record and determine for themselves what would be "reasonable compensation" and whether

the jury's award "deviates materially" from it.[2] *See Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1013 & n.10 (2d Cir. 1995) (explaining difference between New York and federal standards of review).

Amici do not address the question of whether the Court of Appeals' decision to apply the New York statute is consistent with the principles of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Even if the decision below were unobjectionable on *Erie* grounds, it would nonetheless run afoul of the Seventh Amendment. *See Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 376-77 (1913) (federal courts may not apply state statutes in violation of Seventh Amendment which, "although not applicable to proceedings in the courts of the several States, is controlling in the Federal courts").

The Re-Examination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." More than a century and a half ago, Justice Story wrote that the Re-Examination Clause is a "substantial and independent clause" that is in fact "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause is a prohibition on "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

The Seventh Amendment does not permit federal appellate courts to re-examine facts found by juries on a *de novo*, "weight-of-the-evidence," "thirteenth juror," or any similar basis. The Court of Appeals' approach flies in the face of two centuries of precedent in this Court; English practice at common law; and both the plain language and the principal purpose of the Seventh Amendment.

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[2] *See, e.g., Pasquale v. Miller*, 194 A.D.2d 597, 598, 599 N.Y.S.2d 58, 60 (2d Dept. 1993) (recomputing award based on court's "find[ings]" with respect to "the nature of [the plaintiff's] illness, the extent to which she was able to return to her normal activities following her hospitalization, and the evidence regarding any lingering effects of the illness"); *Kirschhoffer v. Van Dyke*, 173 A.D.2d 7, 10-11, 577 N.Y.S.2d 512, 514-15 (2d Dept. 1991) (concluding, "after carefully reviewing the entire record," that "the verdict deviates materially from what would be reasonable compensation"); *Jurgen v. Linesburgh*, 159 A.D.2d 689, 690, 553 N.Y.S.2d 438, 439 (2d Dept. 1990) (reducing award based on appellate court's "review of the record" and its "find[ings]").

A. At Least 20 Decisions of This Court Have Relied on the Seventh Amendment to Bar *De Novo* or Weight-of-the-Evidence Review by Federal Appellate Courts

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). Thus, from its earliest decisions addressing the issue, this Court has uniformly held that the Seventh Amendment prohibits federal appellate courts from reviewing on a *de novo* or weight-of-the-evidence basis *any* finding of fact made by a jury and approved by the trial court. In *Parsons v. Bedford*, Justice Story held that a trial court did not err in refusing to transcribe testimony, which the petitioner sought "in order to establish the error of the verdict in matters of fact." 28 U.S. (3 Pet.) at 445. Justice Story explained that the application was immaterial because the Re-Examination Clause of the Seventh Amendment prohibited appellate review of such factual questions. *Id.* at 446-48.[3]

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[3] *See also Hansen v. Boyd*, 161 U.S. 397, 402 (1896) ("ask[ing] us to determine the weight of proof" would "usurp the province of the jury"); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91 (1891) ("We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) ("this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial"); *Insurance Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 248-49 (1873) ("Facts found by a jury could only be re-examined under the rules of the common law . . . . Nothing, therefore, is open to re-examination in this case."); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858) ("Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court."); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838) (deeming it "a point too well settled, to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial"); *Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 191 (1809) ("it would be improper" for an appellate court to review a denial of a new trial "upon the ground that the verdict was contrary to evidence").

In *Railroad Co. v. Fraloff*, 100 U.S. 24 (1879), this Court first addressed the specific question of whether an allegedly excessive verdict was reviewable on appeal where there was no issue of faulty instructions or other trial error. Justice Harlan explained that appellate review was unavailable:

> [T]his court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. . . . Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by *the Constitution* to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Id. at 31-32 (emphasis added). This Court has repeatedly reaffirmed the rule that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court" and "does not present a question for reexamination" in an appellate court. *Southern Ry. Co. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.).[4]

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[4] *See also Dimick v. Schiedt*, 293 U.S. 474, 489 (1935) (Stone, J., dissenting) (referring to the rule "of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial."); *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915) (excessiveness challenge "involves only a question of fact and is not open to reconsideration here"); *Texas & Pac. Ry. Co. v. Hill*, 237 U.S. 208, 215 (1915) ("the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open" to review); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910) ("As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."); *Lincoln v. Power*, 151 U.S. 436, 437 (1894) (rejecting excessiveness challenge because "it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury"); *New York, Lake Erie & W.R.R. v. Winter's Adm'r*, 143 U.S. 60, 75 (1892) ("Whether the verdict was excessive, is

Writing for the Court in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), Justice Brandeis declared that "[t]he rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by *a long and unbroken line of decisions*; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." *Id.* at 481 (emphasis added; footnotes omitted). In 1940, this Court observed that, "[c]ertainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). As late as 1954, this Court stated that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment." *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n.5 (1954).

The practice in question is not inherently pro-plaintiff. *See, e.g., Fairmount Glass Works*, 287 U.S. at 485 (refusing to award a new trial to a plaintiff who was awarded only $1 in damages for a breach of contract worth more than $32,000). Rather, the rule derives from fundamental constitutional principles. Thus, many of this Court's decisions have expressly relied on the Seventh Amendment. *E.g., Fairmount Glass Works*, 287 U.S. at 482; *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887); *Fraloff*, 100 U.S. at 31; *Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); *Folsom*, 85 U.S. at 248-49; *Silsbee*, 62

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not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here."); *Wilson v. Everett*, 139 U.S. 616, 621 (1891) (rejecting excessiveness claim because "this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial . . . . The case was fairly submitted to the jury, and the issues involved were passed upon by them."); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order of overruling the motion for the new trial based upon that ground was erroneous or not, our power is restricted to the determination of questions of law arising upon the record.").

U.S. at 166. Other decisions have relied on precedent which in turn was premised on the Seventh Amendment.[5]

Until relatively recently in the history of federal judicial practice, the lower federal courts similarly understood "that the power to set aside a verdict as against the weight of the evidence 'belongs exclusively to the trial judge,' whose action on a motion of this kind 'is not the subject of review,' and that the appellate court is 'without power' to order a new trial on this ground." *See* Wright & Miller, *supra*, § 2819, at 199 (footnotes omitted). Judge Learned Hand explained that "[a] motion for a new trial, though very ancient, was never regarded as part of the bill [of exceptions], but rather as an independent method of review, and there was no review of that review." *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 464 (2d Cir. 1930) (citation omitted). In 1953, Judge Hand again stated that the "rule is too well established to justify discussion" that "there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman*, 201 F.2d at 848.[6]

The change in the practice of the federal courts of appeals came after the revision and recodification of the Judicial Code in 1948, which omitted the explicit statutory ban on reversals "for any error in

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[5] *E.g., Craft*, 237 U.S. at 661 (citing *Fraloff*); *McDaniels*, 107 U.S. at 456 (same), *Southern Ry. v. Bennett*, 233 U.S. at 87 (citing *Lincoln*); *Herencia*, 219 U.S. at 45 (same); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909) (same); *Texas & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 469 (1903) (same); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 75 (1889) (citing *Parsons*, *Folsom*, and *Fraloff*).

[6] *See also Pariser v. City of New York*, 146 F.2d 431, 433-34 (2d Cir. 1945) ("If the amount of the verdict be regarded as in fact excessive, nevertheless it was the jury's estimate arrived at after a proper charge. Such a matter is not reviewable on appeal . . . .") (Augustus N. Hand, J.); *Williamson v. Osenton*, 220 F. 653, 655 (4th Cir. 1915) ("this court cannot review the action of the District Court in refusing to grant a new trial for excess in the verdict. The provision of the seventh amendment of the Constitution that 'no fact once tried by a jury shall be otherwise reexamin[ed] in any court of the United States, than according to the rules of the common law,' was held in *Parsons v. Bedford*, 3 Pet. 433, to deny to a federal appellate court that power.").

fact" that had existed since 1789. See pp. 17-18, 23, *infra*. Erroneously believing that this revision and recodification was intended to work a radical (and constitutionally problematic) alteration in federal appellate practice, courts of appeals gradually began to assert the authority to grant a new trial, or a remittitur, on grounds of excessiveness. *See, e.g., Dagnello v. Long Island R.R.*, 289 F.2d 797, 800 (2d Cir. 1961). This Court spurred this unfortunate trend in *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 101 (1950), with the gratuitous dictum: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case" — even though the defendant had not claimed that the damages were excessive.

Since then, the courts of appeals have interpreted *Affolder* as implicitly authorizing appellate review of the weight of the evidence under an abuse-of-discretion standard. This expansion of appellate power was not without criticism. Early on, then-Judge Blackmun expressed strong constitutional reservations about the authority of appellate courts to review the denial of new trial motions raising excessiveness objections. *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir. 1961), *cert. denied*, 368 U.S. 929 (1961). The Eighth Circuit has continued to question whether such authority exists,[7] as has the Second Circuit, which recently reiterated that denial of a new trial motion "is one of those few rulings that is simply unavailable for appellate review." *Stonewall Ins. Co.*, 1995 U.S. App. LEXIS 35230 at *53 (citing *Portman*, 201 F.2d at 848).[8]

This Court has on three separate occasions pointedly declined to authorize the lower courts' assertion of weight-of-the-evidence appellate review. This Court granted *certiorari* in *Neese v. Southern Ry.*, 350 U.S. 77 (1955) (per curiam), to review a Fourth Circuit

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[7] *See Green v. American Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986); *see also Thongvanh v. Thalacker*, 17 F.3d 256, 259-60 (8th Cir. 1994); *Czajka v. Black*, 901 F.2d 1484, 1485 (8th Cir. 1990); *Chohlis v. Cessna Aircraft Co.*, 760 F.2d 901, 906 (8th Cir. 1985).

[8] *See also Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993); *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, 157 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 290 (1993); *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 133 (2d Cir. 1986); *Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970).

decision granting a new trial on the ground that the damages were excessive. But this Court did not decide the constitutional authority for the appellate court's action; instead, it held merely that the trial judge's decision sustaining the jury verdict had sufficient "support in the record." *Id.* at 77; *see also id.* ("We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive.").

A decade later, in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968), this Court granted *certiorari* to review the question "[w]hether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness." Pet. Br. in No. 67-35, at 2. Once again, however, this Court did not reach the constitutional question, holding that the trial court had not erred in sustaining the original jury verdict. *See* 393 U.S. at 160-62.

More recently, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court pointedly observed that "[w]e have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case." *Id.* at 279 n.25. This Court proceeded to stress that "federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 280 n.26.

The modern-day development of the practice of appellate weight-of-the-evidence review thus lends no support to its legitimacy. Moreover, as Justice Kennedy has commented in another context, "it has never been the rule that federal courts . . . acquire power by adverse possession," *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (dissenting opinion) — especially where, as here, the historical evidence clearly indicates the limited nature of federal judicial authority.

B. The Historical Evidence Strongly Supports This Court's Prior Decisions

"It is extremely difficult to reconcile appellate review, under any circumstances, of the denial of . . . new trial motions with the Seventh Amendment, which prohibits reexamination of any 'fact tried by jury . . . [other] than according to the rules of the common law.'" Wright & Miller, *supra*, § 2819, at 202; *see also* Charles Alan Wright, LAW OF THE FEDERAL COURTS § 95, at 681-82 (5th ed. 1994).[9]

1. *English common-law practice*

Under the Re-Examination Clause, "when a trial by jury has been had in an action at law, . . . the facts there tried and decided cannot be reexamined in any court of the United States, otherwise than according to the rules of the common law of England." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899).

In 18th century England, there were three common-law courts of record having original jurisdiction: the King's Bench, the Exchequer, and the Court of Common Pleas. The Exchequer was the court in which the King collected revenue. J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 56 (3d ed. 1990). The King's Bench was held "'before the lord king wheresoever he should be in England' . . . and was therefore excluded from hearing 'common pleas.'" *Id.* at 45. Common pleas for this purpose were all suits in which the king had no interest and composed the vast majority of the civil common law.

Although all three courts sat at Westminster, actions were rarely tried there. Rather, under the *nisi prius* system, judges from all courts would ride circuit and try cases in the local counties. W.R. Cornish & G. de N. Clark, LAW AND SOCIETY IN ENGLAND 1750-1950, at 23 (1989); G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL

[9] The rule is different where the district court has granted a new trial. *See* Wright & Miller, *supra*, § 2819, at 205 ("There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.").

SYSTEM 90, 183-84 (3d ed. 1954). Most cases were tried in the litigants' county, rather than at Westminster. The verdicts were returned to Westminster, where they were entered by the full court. Radcliffe & Cross, *supra*, at 91, 186.

The system of post-trial review was restricted. At common law, an appeal and a motion for a new trial "were mutually exclusive remedies." *Fairmount Glass Works*, 287 U.S. at 482 n.9 (citations omitted). An appeal took the form of a "writ of error," which removed the case to a different and higher court[10] and was strictly confined to matters of law on the face of the record. Baker, *supra*, at 157; Radcliffe & Cross, *supra*, at 211; Cooley's BLACKSTONE 407, 411 (4th Am. ed. 1899); I W.S. Holdsworth, A HISTORY OF ENGLISH COMMON LAW 91 (2d ed. 1922). Historically, the writ of error searched only the record of process, pleadings, verdict, and judgment for error of law. Note, *Appealability of Rulings on Motion for New Trial in the Federal Court*, 98 U. PA. L. REV. 575, 575 (1950). Examples of error included "discrepancies between the amounts claimed and those awarded, irregularities in the panel of jurors, failure to notify parties of adjournments, and so on." A.K.R. Kiralfy, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 68 (5th ed. 1958).

A motion for new trial, on the other hand, "was addressed to the discretion of the court in banc" at Westminster. *Fairmount Glass Works*, 287 U.S. at 482 n.9. It was made before judgment had been entered by the full court, and was not an appellate procedure. A motion for new trial was generally made on the fourth day of the next term to the full bench of the court from which the process originated. Such a motion followed the verdict, and judgment was not entered until the motion was denied. The procedure was informal, being based on the trial judge's information as supplied to his colleagues. The decision was final and subject to no further review as to factual matters. Radcliffe & Cross, *supra*, at 211-12 ("one could not appeal against a refusal of the court *in banc* to grant a new trial"); Cooley's

[10] The system of review was complicated by the fact that the same court might sit at different times in a trial or review capacity. Baker, *supra*, at 158; A.T. Carter, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 88 (1986); Radcliffe & Cross, *supra*, at 212-13.

BLACKSTONE, *supra*, at 38-45, 57, 58, 391-392.[11]

The definitive point is that the motion was passed upon by the same court in which the action was begun and in which it was tried. Consideration of the motion was not a form of appellate review. *See* Baker, *supra*, at 159 (The power to grant a new trial was "exercised before judgment, and not by a court of appeal. Once the court in banc had given judgment, the only redress was of the limited kind provided by writ of error."); Kiralfy, *supra*, at 56 (*nisi prius* judge recorded the verdict, but judgment was entered at Westminster); *Moore*, 121 U.S. at 573 (noting similar practice in trial courts of District of Columbia).

In addition, at common law "no English court ever set aside . . . a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses and heard them testify." Maxfield Weisbrod, Note, *Limitations on Trial By Jury In Illinois*, 19 CHI. KENT L. REV. 91, 92 (1940). Thus, "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified and, even then, only if he could persuade his brethren at Westminster to this view." Wright & Miller, *supra*, § 2819, at 204.[12]

Moreover, the en banc court often refused to acquiesce in the trial judge's recommendation. Baker, *supra*, at 101. The court would not "order a new trial simply because it did not agree with the verdict. If there was no misdirection [of the jury] and there was some evidence on which the verdict could be supported, then it must stand." Radcliffe & Cross, *supra*, at 187; *see also Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336 (1994) (recognizing "the deference ordinarily afforded jury verdicts" at common law and in early American courts).

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[11] In 1854, the Common Law Procedure Act allowed the Exchequer Chamber to review a refusal to grant a new trial in a limited class of cases, but it maintained an important restriction: "'where the application for a new trial is upon Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed.'" *Fairmount Glass Works*, 287 U.S. at 482 n.9.

[12] *See also* John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 213 (1988) (explaining that the King's Bench held that a "new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence") (emphasis in original).

In short, there was no factual appellate review at common law. "To allow appellate review of the denial of the new-trial motion would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge has found that the verdict is not against the clear weight of the evidence. This would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." Wright & Miller, *supra*, § 2819, at 204; *see also* Wright, LAW OF FEDERAL COURTS, *supra*, § 95, at 681-82.

2. *The genesis of the Seventh Amendment*

The Seventh Amendment was deliberately adopted to protect the jury's fact-finding prerogative against appellate review. The interference with the colonists' right to jury trial had been "one of the important grievances leading to the break with England." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, now C.J., dissenting). Among the colonists' complaints were the extension of the jurisdiction of the reorganized courts of admiralty and vice-admiralty and the assertion of appellate review by the Privy Council in London, which claimed the authority to disallow acts of colonial legislatures and overturn verdicts of colonial juries and judgments of colonial courts. 1 Homer Carey Hockett, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 55 (1939) (Council reviewed some 265 colonial cases). The colonists found this practice "expensive, dilatory, and vexatious." Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 77 (1957). The Council rejected attempts by the colonies to preserve the finality of their own judicial judgments. Colonial legislatures sought to bar review altogether, limit the time for appeals to the Privy Council, or limit the cases in which they might be brought. *See* Hockett, *supra*, at 54; Pound, *supra*, at 77. The Privy Council disregarded such attempts, reviewing some 50 cases on petition after colonial courts had refused to grant leave to appeal. *See* Hockett, *supra*, at 55 n.12. Such arbitrary review contributed to the colonists' belief that they were the victims of a remote, "centralized administration at Westminster which continually neglected or even positively injured [their] interests." *Id.* at 71; *see also* Bernard Bailyn, THE ORIGINS OF AMERICAN POLITICS 67-70 (1968).

This experience was not forgotten during the framing of the Constitution. "Geography preoccupied the founding generation." Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469 (1989). None other than John Marshall raised the spectre of "being dragged to the centre of the United States" to a faraway court.[13] *See also* U.S. Const., art. III, § 2, cl. 2 (suits against Ambassadors must be brought in centrally located Supreme Court); *id.* at art. III, § 2, cl. 3 and amend. VI (criminal trials must be in local venues). George Mason remarked: "Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again."[14] Not surprisingly, the framers expressed a strong "preference for local juries, who would be more familiar with the parties and witnesses, and thus in a better position to assess their credibility and character. . . . [A]ppellate review was generally not seen as authorizing a 'new trial' by the appellate judges." Amar, *supra*, at 472-73 (footnote omitted).[15] Indeed, "the right to a jury trial and the corresponding limitation on appellate courts' review of fact were foremost in the minds of the Framers." J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 498 (1985).

As initially proposed to the States, the Constitution provided in Art. III, § 2, cl. 2 that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact," and it contained no bill of rights. The antifederalists contended that this power would invade the

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[13] Jonathan Elliot, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552-53 (1836) ("ELLIOT'S DEBATES").

[14] 3 ELLIOT'S DEBATES at 526.

[15] For further discussions of the importance with which the framers treated the issue of geography, *see* Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 125 (1995) (noting framers' "obsess[ion]" with geographic concerns); Akhil Reed Amar, *Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1560 (1990) ("one of the biggest differences between Supreme Court and lower federal court judges is geographic").

jury's domain.[16] Federalists such as Hamilton assured skeptics that the extension of "appellate jurisdiction" to "matters of fact" would not work "an implied supersedure of the trial by jury." THE FEDERALIST NO. 83, at 509 (H. Lodge ed. 1888).

The outcome of the debate was that "on the matter of civil jury trial the antifederalists won." Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 672 (1973). Restrictions on appellate review were inserted into the Judiciary Act of 1789, which provided in Section 17 that new trials could be granted only "for reasons for which new trials have usually been granted in the courts of law." 1 Stat. 83. Furthermore, Section 22 provided that there should be "no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact." 1 Stat. 84-85.

The same concerns were manifested in the Seventh Amendment. "[T]he entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Wolfram, *supra*, 57 MINN. L. REV. at 657. The Re-Examination Clause was inserted into the Seventh Amendment specifically in order to address the "vexing question of appellate review of questions of fact." *Id.* at 727. As this Court observed in *The Justices v. Murray*, 76 U.S. 274 (1870), the Seventh Amendment was adopted mainly due to "the apprehension and alarm in respect to the *appellate jurisdiction* of this court over cases tried by a jury." *Id.* at 281 (emphasis added). *See also* Higginbotham, *supra*, 56 TEX. L. REV. at 49-50, 58, 60.

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[16] Patrick Henry warned that the Constitution would alter the existing practice whereby "[n]o appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." 3 ELLIOTT'S DEBATES at 544. William Grayson cautioned:

> I lay it down as a principle, that trial by jury is given up to the discretion of congress. If they take it away, will it be a breach of this constitution? I apprehend not; for as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper.

Id. at 568; *see also* Pittman, *Jasper Yeate's Notes on the Pennsylvania Ratifying Convention*, 22 W. & Mary Q. 301, 311 (1965) ("Jury Trials may be superseded in Civil Cases[.] Appellate Jurisdiction is a Civil Law Term[.] There can be no Appeal after Jury Trials. I fear there is an Intention to substitute the Civil Law and the Room of the Common Law[.]").

Those on the scene near the time of the Seventh Amendment's framing — who were also familiar with English practice — understood it as foreclosing weight-of-the-evidence appellate review. Justice Story, for example, commented that "[t]he only modes known to the common law to re-examine such facts [found by a jury], are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a [new trial], by an appellate court, for some error of law which intervened in the proceedings." *Parsons*, 28 U.S. at 448. The Seventh Amendment "is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner." *Id.* at 447-48.

C. The Asserted Justifications for Weight-of-the-Evidence Appellate Review are Demonstrably Inadequate

1. The Judiciary Act of 1789 gave federal circuit courts authority to review the final decisions of the district courts in civil cases only on writ of error and prohibited reversals for errors of fact. 1 Stat. 84-85. As commonly understood, this procedural device was concerned only with errors of law apparent on the face of the record. *E.g.*, E.W. Sutherland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 142 (1927). It has been argued that Congress's elimination of the writ of error procedure early in this century and other statutory changes authorize federal appellate courts to engage in weight-of-the-evidence review. However, even if Congress intended to give the federal appellate courts this power (which it did not, see pp. 22-24, *infra*), the Seventh Amendment prohibited it from doing so.

The previous restrictions on appellate review were not simply a reflection of the writ of error system: they flowed directly from the Seventh Amendment, which provides an even more basic limitation on federal court jurisdiction. Thus, even before the writ of error procedure was eliminated, the record before the appellate court had been enlarged to include in the bill of exceptions a motion for a new trial — yet this Court continued to hold that appellate review of factual issues was unavailable. *See, e.g.*, *Fairmount Glass Works*, 287 U.S. at 482 (specifically noting that the writ of error was not a basis for the denial of review).

2. It is also sometimes suggested that an appellate court, in considering whether the trial court has abused its discretion, is passing

on a question of law rather than a question of fact. However, such an argument is utterly flawed, because it is "so purely verbal, and its implications for the Seventh Amendment so plainly devastating . . . . If a jury finds defendant negligent and the appellate court decides that the clear weight of the evidence shows defendant to be free from negligence, it has reexamined the jury's fact determination." Wright & Miller, *supra*, § 2819, at 202-03.[17] Thus, in *Fairmount Glass Works*, 287 U.S. at 485, this Court declined to adopt the theory that "the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable." Judge Learned Hand, in *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 465 (2d Cir. 1930), disapproved as impracticable the suggestion that federal appellate courts have the power to review for errors of fact the question of alleged excessiveness of damages by the "scholastic refinement" of calling the review one for "abuse of discretion."

This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. *Moore*, 121 U.S. at 574; *see also St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915). Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Appellate courts do have the power to order a new trial on the basis of improper instructions, erroneous admission of evidence, inflammatory closing argument, or other legal error infecting a trial, but there is a world of difference between a legally incorrect *input* that taints a jury's verdict and an *output* that is "tainted" only by a federal court's after-the-fact assessment that the verdict is against the weight of the evidence. Indeed, the same reasoning that purports to justify appellate review for excessiveness could be used to rationalize any

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[17] *See also* William Blume, *Review of Fact in Jury Cases — The Seventh Amendment*, 20 J. AM. JUD. SOC. 130, 131 (1936) ("[I]t cannot be said that the question presented is a question of law. In deciding whether a jury found against the weight of the evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts.").

kind of re-examination of a jury's factfinding — leading to the complete evisceration of the second Clause of the Seventh Amendment.[18]

3. This case presents no issue of whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process "reasonableness" standard. *See Oberg*, 114 S. Ct. at 2339, 2341 n.10, 2342 (referring variously to whether there is "evidence providing at least a rational basis for the particular deprivation of property," whether the award is "arbitrary," and similar formulations). The Court of Appeals did not apply such a standard, but rather employed a far-reaching weight-of-the-evidence or even *de novo* approach.[19]

Nonetheless, it is worth noting that there could be no Fifth Amendment due process right to appellate review even under a substantive due process standard, because the longstanding rule is that there is no right to appellate review *at all*, even in criminal cases.[20] In

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[18] Transforming issues of "fact" into "law" is "drastic in that it amounts to a direct judicial assault on the prerogatives of fact finders." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1018 (1986). The "classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review." *Id.* at 1028.

[19] *See Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) ("It may be admitted that if it were true that the excess appeared as matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court.").

[20] *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987); *Abney v. United States*, 431 U.S. 651, 656 (1977); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *McKane v. Durston*, 153 U.S. 684, 687 (1894). Moreover, it is instructive that this Court originally held that the Seventh Amendment prevented *any* federal court — even a trial court — from granting judgment as a matter of law to the losing party after a jury's verdict, even when there was no legally sufficient evidence to support the verdict. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). Such a result was not thought to violate due process,

addition, *Oberg* concerned the Due Process Clause of the Fourteenth Amendment (not the Fifth Amendment). This Court acknowledged that "[j]udicial deference to jury verdicts may have been stronger in 18th century America than in England, and judges' power to order new trials for excessive damages more contested." 114 S. Ct. at 2342 n.12. Indeed, "it was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself to decide both law and fact." Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1193 (1991).[21]

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and not until the fiction was developed of submitting the case to the jury while reserving a directed verdict motion did the Court hold that post-trial grant of judgment as a matter of law could be permissible under the Seventh Amendment. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

[21] For example, Chief Justice John Jay, in conducting a civil trial in which a State was a party, instructed a jury that it had the authority "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). *See also Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 33 (1795) (Iredell, J.) (explaining in civil case that "though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them"); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859, 899-900 (1991) ("At the time the Fifth Amendment was adopted, juries in America, 'unlike juries today, usually possessed the power to determine both law and fact.' . . . Although the practice of permitting juries to determine the law of the case has since been abandoned, the change occurred through common law development and legislative enactment — not because due process was thought to require it.") (citation omitted); Morton Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 142 (1977) ("The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'").

The colonists lionized the English defenders of the jury, like Lord Chief Justice Camden, who warned in *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C.P. 1763) (denying motion for new trial in tort case), that "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in tort, and which all mankind at first blush must think so." *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 & n.54 (1994) ("Witness, for example, Camden, New Jersey; Camden, South Carolina").

II. THE EXISTING JUDICIAL CODE SHOULD NOT BE CONSTRUED AS AUTHORIZING *DE NOVO* OR WEIGHT-OF-THE-EVIDENCE REVIEW BY FEDERAL APPELLATE COURTS

In light of the historical record at common law and the unbroken line of decisions of this Court which all support the conclusion that the Seventh Amendment does not permit appellate review of jury verdicts for weight of the evidence, it would be quite surprising if Congress nevertheless decided to authorize the federal appellate courts to engage in such review. An analysis of the relevant statutes reveals that Congress has not done so, and certainly has not done so with the unambiguous clarity that would be expected if the Legislature had intended to depart from the settled historical practice of non-review. Because of the general rule that "in a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress,'"[22] as well as the rule that grants of federal jurisdiction to the lower federal courts should be construed narrowly,

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[22] *Concrete Pipe of Cal., Inc. v. Laborers Pension Tr.*, 113 S. Ct. 2264, 2282-83 (1993) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). *See also Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2465-66 (1993); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in result); *Hooper v. California*, 155 U.S. 648, 657 (1895).

This Court has often relied on this principle in an effort to avoid Seventh Amendment issues. *See, e.g., Tull v. United States*, 481 U.S. 412, 417 n.3 (1987); *Pernell v. Southall Realty*, 416 U.S. 363, 365-66 (1974); *Curtis v. Loether*, 415 U.S. 189, 191-92 & n.6 (1974). Indeed, when this Court first confronted the Seventh Amendment issue of whether federal appellate courts may review jury damage awards on grounds of excessiveness, during oral argument Chief Justice Warren requested supplemental briefing on whether the jurisdictional statutes could be construed to deny such review and thereby avoid this Seventh Amendment issue. *See* Supp. Reply Br. for Pet. in *Neese v. Southern Railway Co.*, No. 55-28, at 1. Ultimately, this Court chose to avoid both the constitutional and the statutory issues through a narrow ruling on the facts in *Neese*. *See* 350 U.S. at 77-78.

see, e.g., Healy v. Ratta, 292 U.S. 263, 270 (1934), at a minimum this Court should hold that the federal appellate courts lack the statutory authority to engage in weight-of-the-evidence review.

Simultaneous with its creation of the federal appellate judiciary, Congress adopted Section 22 of the Judiciary Act of 1789, which plainly barred any appellate review for weight of the evidence — reflecting a principle that was later incorporated into the Seventh Amendment. This limitation was in addition to the threshold limitation, inherent in Section 17 of the Judiciary Act, that federal courts were empowered to grant new trials only "for reasons for which new trials have usually been granted in the courts of law," 1 Stat. 83, a limitation which continues in Fed. R. Civ. P. 59(a).

Section 22 was expressly carried forward in all Judicial Codes promulgated until 1948; its last codification was at 28 U.S.C. § 879 (1940). This limitation on appellate review was explicitly retained in the Judicial Code for two decades after the writ of error procedure was eliminated in 1928 (*see* 45 Stat. 54, 466 (1928), 28 U.S.C. §§ 861a, 861b (1940)).

To be sure, the language of 28 U.S.C. § 879 (1940) (and originally of Section 22 of the Judiciary Act of 1789) mandating that there be "no reversal . . . for error in fact" did not survive the 1948 revision and recodification of the Judicial Code. Section 879 was recodified into present 28 U.S.C. § 2105, which retained language in Section 879 concerning the ban on reversal upon matters in abatement not involving jurisdiction, but omitted the flat ban on reversal for error in fact. However, under the special rule that this Court has followed for interpreting the 1948 Judicial Code, this omission cannot be read as making a substantive change in the longstanding practice against appellate review for weight of the evidence in jury cases — a practice that therefore still exists today.

In general, of course, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). Applying this rule in its first case interpreting the 1948 revision of the Judicial Code, this Court held that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed" in the Revisers' Notes, where each intended substantive change was "explained in detail." *Fourco Glass Co. v.*

Transmirra Prods. Corp., 353 U.S. 222, 226-28 & nn. 6-8 (1957). *See also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (reaffirming and applying *Fourco Glass*); *Finley v. United States*, 490 U.S. 551, 554-55 (1989) (same).

There is nothing in the text of the 1948 Judicial Code, or in its legislative history, suggesting an intent suddenly to authorize appellate weight-of-the-evidence review in common-law cases tried to a jury. The Revisers' Note for new 28 U.S.C. § 2105 affirmatively makes clear that this was not the intent of the 1948 revision. The blanket reference to "no reversal . . . for error in fact" was dropped not to authorize appellate scrutiny of the weight of the evidence in jury cases, but *solely* "to avoid any construction that matters of fact are not reviewable in nonjury cases."[23] Thus, new Section 2105 simply resolved the tension that had existed between old Section 879 and Fed. R. Civ. P. 52(a) (authorizing appellate review of trial court findings under a "clearly erroneous" standard), which had taken effect a decade earlier. There is no indication, anywhere, of any intent by Congress to make any other change in the law.

Reading the 1948 Judicial Code as continuing the bar on appellate weight-of-the-evidence review of jury verdicts comports: (1) with the rule that statutes should be read if possible to avoid constitutional issues, (2) with the rule that grants of federal jurisdiction should be construed narrowly, and (3) with the rule that the 1948 revisions of the Judicial Code do not change the prior law absent a clear statement by Congress of its intent to do so. As an added virtue, it comports with a commonsense approach to the administration of justice by refusing

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[23] The Revisers' Note (printed at the end of 28 U.S.C. § 2105) reads in full:

> The revised language is substituted for the provisions of section 879 of Title 28, U.S.C., 1040 ed., to avoid any construction that matters of fact are not reviewable in nonjury cases. Such section 879 related to review upon a writ of error which applied only to actions at law. (See Rule 52(a) of the Federal Rules of Civil Procedure limiting the review of questions of fact which renders unnecessary any statutory limitation.)
>
> Rule 7(c) of the Federal Rules of Civil Procedure abolished all pleas, and the rules adopted the motion as a substitute therefor.
>
> Words "matters in abatement" were, therefore, substituted for the abolished "plea to the jurisdiction."
>
> Changes were made in phraseology.

to attribute to Congress an intent to saddle the federal appellate courts with an enormously burdensome duty that has no significant utility and that would divert enormous resources from other, much more important duties that Congress clearly has vested in the federal appellate courts.

1. To put things in perspective, weight-of-the-evidence review is not needed at all, at any level, to provide basic fairness to litigants. Due process is satisfied where *one* trial of the facts has been held, uninfected by prejudicial legal error. *See Pittsburgh, Cincinnati & Chi. Ry. v. Backus*, 154 U.S. 421, 426-27 (1894) ("[a] hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect"); *Louisville and Nashville R.R. Co. v. Woodson*, 134 U.S. 614, 623 (1890) (even where the trial court "would have found a different verdict, because of the weakness of the evidence," due process is satisfied where "there was some evidence" in its support); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 328 (1796) (Ellsworth, C.J.) ("Surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over."). By definition, weight-of-the-evidence review occurs only *after* it has been determined that the jury's verdict is rational and supported by proper evidence, so that the result fully satisfies due process. *See Oberg*, 114 S. Ct. at 2341 n.10; *Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979).

2. Assuming that weight-of-the-evidence review is allowed, it is difficult to see the point of having further review after the trial judge, who sat through the trial and saw all the witnesses, has decided that the jury's verdict is *not* against the weight of the evidence. As one leading scholar observed in another context, there is "the possibility of error inherent in any process," but the presumption should be "that if a job can be well done once, it should not be done twice." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 448, 451 (1963). Especially in this context, where no constitutional rights are at stake, if "one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'?

Why should we duplicate effort?" *Id.* There should be "some reasoned institutional justification" for duplicating effort, not just "second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth'." *Id.*

Clearly, a second level of weight-of-the-evidence review cannot be justified on the theory that appellate judges are *better* at accurately assessing the weight of the evidence in a record. Given the careful selection system for federal trial judges, "it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges." Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957). On weight-of-the-evidence issues, appellate judges lack access to information that is critically relevant, and probably essential, to weighing the evidence accurately: "the trial judge has the vast advantage of having been present in the courtroom and heard the witnesses." *Id.* Thus, motions for a new trial "can be more satisfactorily dealt with by the judge who tried the cause, and who had the opportunity of seeing the witnesses and hearing them testify." *Moore*, 121 U.S. at 572-73. Indeed, the Court of Appeals confessed in this very case that "[r]emittitur always presents difficult problems for appellate courts. We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. . . . In the end, it is not our job to impose a specific award of damages — that task is for the jury." Pet. App. 9a.

Especially given that trial judges are obviously more qualified than appellate judges to make an efficient and intelligent assessment of the record as a whole, allowing appellate judges to second-guess the trial judge on a cold record carries a further price: "lessened confidence in the trial judge." Wright, *supra*, 41 MINN. L. REV. at 782. There is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, at 451.

3. Weight-of-the-evidence review by appellate courts has virtually no utility because "[a]ctual cases of reversal for this reason are extremely few." Wright & Miller, *supra*, § 2819, at 201 & n.11. An electronic search of all published decisions from all thirteen circuits

during the past decade turned up only eight cases where this power was used to order a new trial — less than one reversal per circuit, per decade.[24] Clearly, United States district judges — who are, after all, fully protected by the tenure and salary provisions of article III — are entirely capable of granting new trials where appropriate.

4. The effort required for appellate courts to find those few cases where the result is rational but where requiring a new trial nevertheless seems warranted, places an enormous burden on appellate courts. As Judge Newman recently explained in a decision reaffirming the Second Circuit rule against weight-of-the-evidence review originally announced by Judge Learned Hand:

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[24] The LEXIS search was performed in the "Genfed" library, "USApp" file, searching for: "(weigh! w/2 evidence) w/25 new trial and date aft 1/1/86." The search produced (as of February 19, 1996) 753 cases, of which 555 were published cases. The eight cases which, at least arguably, involve reversals of the trial judge's refusal to grant a new trial on weight-of-the-evidence grounds are: *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1190 (7th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Standard Havens Products v. Gencor Industries*, 953 F.2d 1360, 1372 (Fed. Cir. 1991), *cert. denied*, 506 U.S. 817 (1992); *Insurance Co. of North America v. Valente*, 933 F.2d 921, 923-25 (11th Cir. 1991); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 301 (3rd Cir.), *cert. denied*, 502 U.S. 939 (1991); *Continental Cas. v. S.W. Bell Telephone Co.*, 860 F.2d 970, 973 (10th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *Jowers v. Nationwide Ins. Co.*, 832 F.2d 1246, 1255 (11th Cir. 1987); *Dadurian v. Underwriters at Lloyd's, London*, 787 F.2d 756, 762 (1st Cir. 1986).

It should be noted that eleven other cases contain language about weight of the evidence but actually appear to order a new trial on the ground that the result reached by the jury was irrational, based on the evidence at trial: *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656-57 (8th Cir. 1995); *Unisplay v. American Electronic Sign Co.*, 69 F.3d 512, 518-19 (Fed. Cir. 1995); *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 277-78 (3rd Cir. 1995); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1057 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995); *Brunneman v. Terra Intern., Inc.*, 975 F.2d 175, 178 (5th Cir. 1992); *Hendricks & Associates, Inc. v. Daewoo Corp.*, 923 F.2d 209, 220 (1st Cir. 1991); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989); *Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 506-507 (5th Cir. 1989); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 973 (2nd Cir. 1987); *Keeler v. Richards Mfg. Co., Inc.*, 817 F.2d 1197, 1202-1203 (5th Cir. 1987); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022, 1032 (1987).

> Review of a trial court's ruling assessing the weight of the evidence imposes on an appellate court far more of a burden than arises from review of a ruling rejecting a challenge to the sufficiency of the evidence. The latter ruling can be readily affirmed as soon as the reviewing court identifies adequate evidence in the record that permits the disputed issue to go to the jury, despite the existence of significant opposing evidence. Such review does not require an assessment of all the evidence. Reviewing a ruling on a "weight of the evidence" challenge, however, obliges a reviewing court to examine in some detail all of the evidence. That burdensome review is . . . not warranted . . . where a trial judge denies a "weight of the evidence" challenge and leaves in place a jury verdict supported by legally sufficient evidence.

Stonewall Ins. Co., 1995 U.S. App. LEXIS 35230, at *52-*53 & n. 13.[25] A holding that federal appellate courts have the authority to review for weight of the evidence implies a duty to exercise that power,[26] so that appellate judges will be saddled with a mandatory duty to read the entire record in each case, upon the request of any disgruntled litigant, unless and until Congress acts to lift that burden.

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[25] *See also LaFollette v. Savage*, 63 F.3d 540, 544 (7th Cir. 1995) (noting that a weight-of-the-evidence argument "require[s] this court to thoroughly review the testimonial and documentary evidence admitted at trial."); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1253 (10th Cir. 1992) (denying motion for new trial "[a]fter thorough review of the record"), *cert. denied*, 507 U.S. 973 (1993); *Jordan v. United States Lines, Inc.*, 738 F.2d 48, 49 (1st Cir. 1984) (Breyer, J.) (denying motion for new trial after "carefully reading the record").

[26] *See, e.g., Second Employers' Liab. Cases*, 223 U.S. 1, 58 (1912) ("The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61, 87 (1809) ("The duties of this court, to exercise jurisdiction where it is confered, and not to usurp it where it is not conferred, are of equal obligation").

5. Finally, the burden is compounded by the fact that the very prospect of such review attracts large numbers of additional appeals. "[N]o matter how guarded the review may be said to be, [it is] an invitation to the litigant to take his case to the court of appeals, in the hope that it will find he falls within the new dispensation." Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 967 (1964).[27] Especially given "the current appellate capacity crisis in the Federal Courts of Appeals . . . born of spiraling federal filings and an increased tendency to appeal District Court decisions,"[28] "litigants would be better off, and

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[27] *See also* Wright & Miller, *supra*, § 2819, at 204 ("So long as the appellate courts hold open any possibility of reversal on this ground, they invite litigants to come to them in countless cases arguing about the weight of the evidence. Thus, extra burdens are put on the appellate courts and the burdens are for no good purpose, considering how extraordinarily rare it is that there is ever a reversal on this ground.").

The temptation to appeal simply to invoke weight-of-the-evidence review is especially great because an appeal — even on the entire record — entails a fraction of the cost of the trial, now that trial records need no longer be commercially printed but may instead be cheaply photocopied. Hon. Ruggero J. Aldisert, WINNING ON APPEAL 8-9 (1992). As Judge Aldisert has observed, emotion-laden clients increasingly respond to a loss at trial with the attitude: "'I got a raw deal. Hey, it's just a crap shoot and maybe I'll be lucky.' Most people think cases are retried *de novo*. They simply cannot recognize that courts of appeals have limited review powers." *Id.* at 8.

[28] Remarks of Chief Justice William H. Rehnquist, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 256, 257 (Apr. 30, 1992). *See also Behrens v. Pelletier*, 64 U.S.L.W. 4081, 4088 (U.S. Feb. 21, 1996) (Breyer, J., joined by Stevens, J., dissenting) ("overloaded dockets threaten the federal appellate system"); Judicial Conference of the United States, Long Range Plan for the Federal Courts 132 (Dec. 1995) ("If conditions seriously deteriorate in the court of appeals, it may be necessary to consider some limitations on the right of appeal"); Hon. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1488 (1995) (noting "unremitting recourse to federal courts and an increasing rate of appeals to courts with already critically strained resources"); Hon. Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1512 (1995) ("the drastic and sometimes counterproductive measures we have undertaken have not significantly alleviated the problems resulting from

appellate court loads substantially lightened, if appellate review were clearly understood to be limited to serious errors of law, rather than to include a second evaluation of shadowy questions of a factual nature." Wright, *supra*, 42 TEX. L. REV. at 968.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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[the] grossly excessive workload" of the federal appellate courts); Hon. Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK UNIV. L. REV. 29, 33 (1990) (noting grounds for serious doubt about the value of "opinions that, *on average*, can take no more than two or three days of a judge's own time"); Hon. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 374, (1988) ("The role of the judge as contemplative craftsman and reflective scrivener has eroded to virtual extinction."). *See generally* Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31-51 (1994); Hon. Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 59-129, 317-21 (1985).

(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE PICTURE AGENCY COUNCIL OF AMERICA, INC. (PACA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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95-719

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

WILLIAM GASPERINI,

Petitioner,

- against -

THE CENTER FOR HUMANITIES, INC.,

Respondent.

IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

The Picture Agency Council of America, Inc. (PACA) submits this brief *amicus curaie* in support of petitioner, William Gasperini, a professional photojournalist.[1]

Picture Agency Council of America, Inc. is a non-profit trade association incorporated in 1977 and known under its trade name PACA. PACA is comprised of 101 stock picture agencies in North America. Stock agencies maintain in "stock" a library of original photographic imagery which is leased to users, such as book publishers, magazines, newspapers, advertisers, etc. The professional photographer is paid a license fee for reproduction of his or

[1] Consent letters have been filed with the Clerk of this Court.

her work by the publisher, and the stock agency is paid a commission as the photographer's agent.

PACA represents approximately 15,000 professional photographers. PACA's smaller sized members each manage approximately 200,000 images, and PACA's larger members maintain libraries of over 8-10 million images each.

As agents for professional photographers, PACA's members negotiate license fees, and when necessary, protect photographers' interests by bringing claims against third parties for copyright infringement, or money damages when a photographer's images are damaged or lost.

PACA's goal is to develop uniform business practices in the stock photo industry, based upon ethical standards established by the membership. Among its Code of Ethics, signed by every member, is that each stock agency will endeavor to promote policies and practices that serve to elevate the stock picture industry, rigorously maintain the high standards of honesty and fair play with clients, photographers and each other.

This case raises the issue of damages for lost commercial transparencies, and specifically, whether a jury award of $1,500 for each slide was excessive. Because PACA's members have experience with the value of transparencies, and have a stake in the continued reasonable valuation of commercial transparencies, we urge the Court to rule in favor of the Petitioner.

We submit this brief to correct the misperception of the Circuit Court that (i) the value of $1,500 for a commercial transparency represents unreasonable compensation; or (ii) the work of a photojournalist is somehow not as

commercially valuable as that of other professional photographers.

Equally at stake is the strength of our jury system. The average person is unfamiliar with the structure of the photographic industry, or the value of original images. A jury trial enables counsel for a professional photographer to educate the jury about the commercial principles relied on by professional photographers, their agents and users of original images. Thus, when a jury has been presented evidence of value at trial, and returns a verdict, the appellate courts should not sit as a thirteenth juror with veto power and make their own factual findings contradicting the wisdom of the jury.

This situation is ever increasing among jury awards for damages in lost transparency cases. Because PACA members often bring legal action for their photographers, PACA has a profound interest in preserving the members' right to a jury trial when seeking judicial redress for damaged or lost transparencies.

PACA will not burden the court by duplicating information presented by Petitioner. PACA has insight from long experience into the business of photography, and we believe these insights are important for the Court's understanding, in order to place the legal issues in context with industry realities ignored by the Second Circuit.

As there is a dearth of cases dealing with the photo reproduction industry, and the value of images is either not known or understood by those not involved with the purchase of reproduction rights, PACA submits this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

A jury's damage award for the loss of original images belonging to a professional photographer should be given great weight. While admittedly, the value of an irreplaceable photograph is difficult to determine, only the jury can listen to the witnesses, view a photographer's portfolio, view examples of a photographer's work or an agency's collection, and in some cases, actually view reproductions of lost work. A cold record is devoid of much of the essential elements that are necessary to determine the value of visual images.

Nor are the hazards of passion and sympathy at play in valuing property for commercial purposes, as in a personal injury case where the victim has suffered grievous harm. Once they have the relevant evidence, juries have consistently understood the complexities of valuing photographs which are rarely sold, but instead, licensed over the life of the copyright, and consistently have awarded reasonable damages.

Contrary to the Second Circuit's statement, the value of $1,500 for a professional photograph, professionally edited, when analyzed in the context of the stock photography industry, is neither a "windfall" nor a "winning lottery ticket." *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 429 (2d Cir. 1995) This figure has been used by the industry to measure damages since the early 1970's. It was never intended to cover every photograph taken by a professional photographer, but only those that have been edited under the most rigid standards for professional quality and marketability. It fairly represents the average license fee a commercial photograph can earn over the lifetime of the photographer's copyright, i.e., life plus fifty years. 17 U.S.C. § 302(a)

Average license fees range from approximately $175 to $10,000 for a one time use. Thus, $1,500 has always been considered a conservative valuation for a photograph that can be used many times. Obviously, some photographs may never earn any fees, and others will earn well over $1,500. The figure is an average, the best approximation of an income earning asset that is difficult to quantify with mathematical certainty.

The need for one value is important to the industry, both for photographers, agents and users. With large libraries of photographs, it is impossible to value photographs individually. Users also need a sum certain so they know the value and can be apprised of the risk and care required in handling photographs and obtain appropriate insurance if they so desire. The risk of that figure being abused is rarely present because it is not the practice for either agents or photographers to submit anything but the best of a collection to a user.

The Second Circuit erred in relying solely on photography cases which rejected the value of $1,500 for transparencies without distinguishing the facts of those cases. In particular, those cases were inapposite because they did not involve carefully edited images, representing the most select pictures from a body of work created over a period of time.[2] The Second Circuit simply overlooked the more factually relevant New York appellate decision supporting the $1,500 value.

A body of work is necessary to tell the complete story of a subject. The value of a body of photographs is greater

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[2] In photography parlance, a "select" means the best pictures from a shoot, and therefore, the pictures that are commercially viable. Often, there may be only one select from an entire roll of film.

than the value of its individual images. Appellate courts often are blinded by the amount of damages requested, and fail to recognize the importance of that body of work to the photographer or the stock agency. In contrast, juries usually understand the irreplaceable loss of a commercial body of work with many potential uses over the life of the photographer's copyright.

The Second Circuit, as often happens in these cases, erred in relying too heavily on the past earnings of the photographs as the dominant indicator of value. In many cases, such as this one, the body of work is only recently created and the photographer and/or agency has not had sufficient time to establish an earnings history for these images. Furthermore, it is common practice for many photographers to focus on assignments and develop a large body of work during the early years of their career. Only once they have accumulated a body of work, and most importantly have had the time to edit the entire collection, do they finally submit the edited images to a photo agency to earn money for their later years, and their heirs who hold the copyright.

Courts, like the Second Circuit, continually misapply the term "unique," by looking solely at the subject of the photograph in the broadest context, rather than considering the aesthetic elements of an individual photograph that makes a photograph unique and commercially valuable. Courts frequently ignore the demands of the photography buying market by labeling a photograph unique or generic. Many highly commercial photographs would not be considered "unique" by a court, yet have extreme marketability and earnings potential. Again, having none of the visual elements in the written record severely handicaps an appellate court from making a fair determination.

Lastly, the case at hand also demonstrates the court's lack of understanding about the various types of photographers who are considered professional. The court's perception of a journalist and photojournalist, and the relative value of the work as compared to other photographers, was skewed by artificially separating income earned for words and income earned from images.

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT MUST BE REVERSED AND THE DAMAGE AWARD BY THE JURY REINSTATED

I.

THE JURY'S FINDING OF DAMAGES SHOULD BE UPHELD, AS THE JURY ALONE WITNESSED FIRST HAND THE EVIDENCE DEMONSTRATING THE VALUE OF PETITIONER'S LOST, ORIGINAL IMAGES

A. Limitations of the Cold Record

The present case dramatically illustrated the need for the deference to jury verdicts guaranteed by the Seventh Amendment. The jury saw and heard a great deal of evidence about the loss of irreplaceable photographic images taken by a professional photojournalist. The jury alone, in these cases, is able to listen to and view all the evidence presented by both sides at the trial. The property lost is visual in nature and the evidence necessary to establish value is often not reproducible in a printed record. As aptly noted by Judge Calabresi: "We review the evidence on a cold paper record, and we compare the

record to prior decisions as to which we have incomplete knowledge of the facts". *Gasperini*, 66 F.3d at 431. Despite this lipservice to the severe limitation of the written record, the Second Circuit chose to disregard the determination of the jury and the trial judge, and issued a *de novo* review of the facts, drastically reducing the award or compelling a new trial.

B. Elements of Valuing Original Photographic Imagery

The courts in New York for some time have recognized that valuing transparencies is an abstract process and have enumerated, the following elements that are to be considered in valuing transparencies:

(i) technical excellence;

(ii) the selective eye of the photographer;

(iii) established prestige and earning level of the photographer;

(iv) uniqueness of the subject matter;

(v) established sales or use prices;

(vi) the degree to which each transparency has an osmotic interaction deriving reflective value from the group; and

(vii) the frequency of acceptance by users.

Hoffman v. Portogallo, Supreme Court, New York County, Index No. 19102/85 (Gabel, J.) 6/26/87, citing as authority *Rattner v. Geo Magazine*, Supreme Court, New York

County, Index No.15762/84, (Shorter, J), N.Y.L.J. page 39, col.2, 3/16/87.[3]

Not all the *Rattner/Hoffman* elements will be applicable in all cases. However, courts outside New York also recognize these elements, choosing to incorporate some, or emphasize others, depending on the particulars of the case. *Miller v. Newsweek*, 675 F.Supp 872 (D. Del. 1987) (omitting three of the seven *Rattner/Hoffman* elements.)

The evidence necessary to establish the above elements requires, in addition to the photographer's direct testimony, a substantial amount of visual, demonstrative evidence that cannot be reproduced in a paper record and in this case, was not reviewed by the appellate court. Evidence in most cases includes the photographer's portfolio, consisting of mounted photographs, tear sheets[4] and slides, establishing his or her reputation and acceptance of the images by users. In most instances, exemplars of the photographer's work must be presented as evidence because the transparencies at issue are lost solely by the fault of the defendant.[5] This

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[3] The Second Circuit correctly states that, in a diversity case, it must predict how the highest court of the state would rule. *Gasperini*, 66 F.3d at 430. The New York Court of Appeals has not ruled in any case involving damage or loss of a professional photographer's work. However, as discussed *infra*, the Second Circuit failed to carefully review New York law on this subject. The *Rattner* and *Hoffman* cases appended hereto were the first to identify the elements for valuing a photographer's lost image. These elements continue to be the source of jury instructions in such cases, including that of petitioner.

[4] I.e., examples of how a photograph was reproduced in a magazine, book or newspaper.

[5] The jury in the present case had the added advantage of viewing a video produced by the respondent containing over 100 of Gasperini's lost

(continued...)

evidence demonstrates the quality of a photographer's work, including his or her selective eye, technical skill and reputation. Although not peculiar to cases involving images, the jury and the trial judge are able to listen and observe all witnesses, including the experts, and determine reliability, credibility, and persuasiveness.

The trend, as in this case, is for appellate court's to second guess the jury, and based on the limited "cold paper record," engage in its own factual review. The Second Circuit's decision is not atypical in finding the photographer's expert witness unpersuasive, or finding it unlikely that the photographer's work would generate future income, or that only certain of the lost or destroyed images were unique, or in assigning significant value to some transparencies, and only nominal value to others.

This independent factual review of a case after a jury trial frustrates the entire purpose of a jury and, in effect, denies photographers and stock agencies a fair trial as guaranteed by the Seventh Amendment. If a jury is presented with sufficient evidence to satisfy the various elements involved to determine damages, and makes an award based on the evidence, the appellate court should not replace its view of the evidence for that of the jury, especially where the trial judge found the award appropriate. Under the American Constitution, the jury system is essential, and remains the backbone of our civil litigation system. PACA members know from experience

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[5] (...continued)
transparencies, as well as examples of his mounted photographs, and those printed in magazines and newspapers, taken in other countries, all evidencing the quality of his work gneerally, and the value of his body of work, separate from any individual images, and the uniqueness of the subject matter he photographed.

that juries can and should be trusted to do their jobs conscientiously and with fairness.

II.

THE VALUE OF $1,500 PER TRANSPARENCY FOR EDITED, PROFESSIONAL PHOTOGRAPHS IS NEITHER UNREASONABLE COMPENSATION NOR SHOCKING

A. The Second Circuit Misunderstood The Governing New York Law

In reviewing New York law, and discarding the average value of $1,500 for each of petitioner's slides, the Second Circuit ignored the most relevant New York case, *Girard Studio Group v Young & Rubicam*, 147 A.D.2d 357 (1st Dep't 1989). Unlike the cases relied on by the Second Circuit, *Girard* involved the loss of a selection of a photographer's best work over a period of years.[6] The jury awarded the photographer $3,000 per lost image. The Appellate Division exercised it powers to review the record *de novo* and reduced the amount to $1,500 per transparency.[7]

The cases relied on by the Second Circuit, *Alen MacWeeney, Inc. v. Esquire Assocs*. 176 A.D. 2d 217, 574 N.Y.S. 2d 340 (1st Dep't 1991) *leave to appeal dismissed*, 79 N.Y. 2d 1015, 584 N.Y.S. 2d 437 (1992); *Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 592 N.Y.S. 2d 27 (1st

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[6] Counsel herein was plaintiff's counsel in *Girard* at both trial and appeal, and therefore, is quite familiar with the facts of that case.

[7] *See* New York Civil Practice Law and Rules, § 5501(c) (McKinney's 1995).

Dep't.), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S. 2d 581 (1993) and *Blackman v. Michael Friedman Publishing Group, Inc.*, 201 A.D.2d 328, 607 N.Y.S.2d 43 (1st Dep't 1994) did not concern the value of edited, select photographs from a large body of work taken over a period of time.

In *Girard*, the court reduced the jury award in line with the practice of valuing professionally edited and select transparencies at $1,500. As in petitioner's case, there was no "delivery memo," i.e., written agreement, containing a liquidated damages clause stipulating $1,500 as the value for a lost slide. Nor was there any evidence in *Girard* of past earnings for the plaintiff's slides. The jury was presented evidence of the subject matter, examples of the photographer's reputation and other work demonstrating his abilities, and testimony on the potential uses of the images over the life of the copyright, i.e, the average remaining life of the photographer plus 50 years.

Notably, none of the photographs were taken in situations of great danger, such as petitioner's helicopter shots, treks to remote and sparsely inhabited areas of Central America, or combat scenes. However, the photographer's lost work in *Girard* were primarily action shots which could not be set up in a studio and recreated. *Girard* should be the controlling case when examining irreplaceable photographs which were the selects off a body of work taken over a period of time.

MacWeeney is an exceptional case because it involved the loss of 189 photographs of a model taken in a studio over the course of one afternoon. One hundred and fourteen of the images were of the same pose. The $1,500 figure was not intended to apply to this type of situation, i.e., unedited shots of the same pose, taken in studio

conditions which could be recreated for a re-shoot fee. Even though the photographer was quite successful, it is understandable that this award was reduced. *MacWeeney* is obviously different from cases involving edited, historic, news and action photographs which are not capable of being recreated.

The award in *Nierenberg* was reduced predominantly because the photographer was a film maker with little experience in photography. Moreover, all 134 lost transparencies depicted the various activities of marching bands.

The plaintiff in *Blackman* was an ex-football player who became a sports photographer. The loss consisted of 146 out of over 2,000 generic shots of football games sent to the defendant. The publisher which lost the slides argued that the market was saturated with pictures of this subject matter, and thus, the court focused on the uniqueness of the lost slides and reduced the award.

B. Application Of The Elements of Valuation

The stock industry has long recognized that photographs meeting technical and aesthetic standards have many commercial uses. Each stock agency employs highly trained picture specialists who recognize the important elements of an image which make it marketable. These include things like composition, lighting, focus, and selective point of view of the photographer. In the case of a body of work, picture specialists understand that the relation of each picture to the whole subject matter is critical, as users often request stock agencies to submit many pictures about one subject matter. The courts in *Rattner/Hoffman* recognized this industry practice, and from that, articulated the elements for valuing lost transparencies

relied on by most courts since then. Professional photographers go through the same stringent editing process in choosing selects from a roll.[8]

The industry value of $1,500 was never intended to apply to every photograph taken by a photographer. Only the images that survive a stringent edit and meet both technical and aesthetic standards are to be valued at $1,500.[9]

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[8] Petitioner carefully edited his body of work taken over a seven year period, selecting only the best 300 slides of more than 5,000 to send to the respondent. That the 300 were selects is evident in that 110 were used in respondent's video, and the balance were retained by the respondent for possible future use in other productions. It is highly unusual that such a large percentage of transparencies are selected by a user, unless they represent the selects of a larger body of work.

[9] Back in the late 1960's, the photographic industry, under the auspices of the American Society of Magazine Photographers ("ASMP"), undertook to establish a fair and equitable value of stock photos. This was done through surveying photographers, agents, advertising agencies and publishers as to the number of times images were sold on average, and the fees paid for the various type of uses. The survey revealed that, on average, a professionally taken and professionally edited image would sell 3 to 8 times over the life of a copyright for fees ranging from $150 to $10,000. It was thus determined that $1,500 per image was a reasonable and conservative value to place on professionally taken and professionally edited photos. The figure first appeared in print in the Guide to Business Practices published in its first edition by ASMP in 1973. It has continued to appear in three subsequent editions plus two editions of the Stock Photography Handbook.

In the intervening years, this figure has been accepted by professional trade associations such as PACA and the American Society of Picture Professionals. Courts and arbitrators have for many years used this $1,500 figure as a benchmark in assessing damages, while determining that some images may be worth more and some worth less. As more than 25 years has lapsed since the initial survey, some individual photographers and photo agencies have increased the stated value of images to $2,000 or $2,500 to reflect current uses, fees and inflationary elements. As a result, some PACA members now demand $2,000 to $2,500.

In examining the $1,500 figure, the Court should be aware of the manner in which photographs are licensed to users. A typical license is for a specific use which covers every imaginable use of an image, i.e., a magazine insert, a book or catalogue cover, textbook illustration, posters, calendars, notecards, direct mail, brochures, national and regional advertising, billboards, CD-ROM, and the new digital uses on the internet and World Wide Web, to name only a few. A fee is negotiated for each type of use. Generally, the longer the duration of use and the greater exposure of an image, the higher the fee. Once used, a photograph is available to other users for infinite uses over the life of the copyright. The $1,500 figure is an average value based on this reality of multiple uses.[10]

The "sale" that equates most closely to a loss in the stock photo industry is a "buyout", where a user will buy the entire copyright to an image, either for a period of time or for the life of the copyright. These "buyouts" are infrequent because they are quite costly. A typical buyout is many thousands of dollars and even then, photographers are reluctant to grant permission, as it precludes multiple future sales. A loss is akin to a buyout since the photographer no longer has the image in his or her collection to license. The agent representing the

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[10] PACA notes that one of petitioner's expert witnesses explained in some detail that she appraises photographic images for estates and galleries, such as Sotheby's, Inc. That transparencies are appraised for estates and estate sellers makes clear that transparencies have recurrent use of many years, and their value is not limited to the photographer's early life, as the Second Circuit seemed to say. As a copyright always lasts years longer than its author (see 17 U.S.C. §302(a)), then the Second Circuit's emphasis on the sales history of petitioner's work up to the time of trial was misguided. By discounting the potential earning power of photographs in the future, the Second Circuit took a snapshot in time to find value, which is not how professional photography is valued. Notably, the jury in the present case heard evidence on this point and obviously understood it.

photographer is likewise affected. Obviously, a photographer who has created a body of irreplaceable work over the course of many years suffers a terrible, commercial loss when all of his or her selects are lost.

The necessity for an industry value for professionally edited and professionally taken photographs should be apparent. With stock libraries ranging from hundreds of thousands to millions of images, stock agencies cannot possibly value individual photographs before sending them to a client for review. The figure of $1,500 was always intended to be a fair average of what a photograph can earn over its lifetime. It is understood that some may earn more, and some may earn less. Users also need to know the value so that: (i) they can properly insure the images once they leave the agency's premises; and (ii) use the due care required in handling valuable property belonging to another.

While the valuation of transparencies has always been problematic, as transparencies are not sold outright in the ordinary course of business, but instead, leased on a per use basis, trial courts who see the evidence first hand, in both juries and non-jury cases, have understood the above concepts and made fair and reasonable determinations. As stated by New York Supreme Court Judge Gabel, in *Hoffman*:

> [I]t is apparent that each of the negatives is an income producing asset from which an image may be sold and resold many times over in the future. Some may be sold more than others. Accordingly, the sum of $1,500.00 is a reasonable valuation of each and every missing negative.

III.

THE SECOND CIRCUIT'S INTERPRETATION OF A "UNIQUE" PHOTOGRAPH BEARS NO RELATION TO THE MEANING OF THAT TERM AS UNDERSTOOD BY MEMBERS OF THE STOCK PHOTOGRAPHY INDUSTRY

The Second Circuit misinterpreted the element of "uniqueness" in assigning a value to petitioner's photographs. The Court emphasized this element, along with past earnings, in isolation, and ignored the other *Rattner/Hoffman* elements which formed the charge to the jury. Thus, the Second Circuit's opinion fails to reflect a true understanding of what makes a professional photograph marketable.

Although the Appellate Division in New York has consistently spoken of uniqueness to determine whether an average value of $1,500 was appropriate in a given case, none of these decisions has defined "uniqueness" as it relates to images generally, or to the images at issue in those cases. *MacWeeney, Nierenberg, Blackman, supra.*

This is true of the Second Circuit as well. It determined that many of the photographs were not "unique" because other photographers were present on certain occasions. The basis of the court's reasoning is faulty, as it misunderstands basic principals of professional photography and most seriously, does not reflect the realities of the stock photography market.

In essence, the term "unique", when applied to photographs is a misnomer. By definition, a photograph represents a moment in time that cannot be recreated. Under that definition, most photographs are "unique".

There are certain studio conditions that can sometimes be recreated, as in *MacWeeney*, when photographing objects or models under known lighting conditions. However, with action and location photography, it is impossible to recreate the conditions to come up with identical photographic results, and *a fortiori*, this is true for historical conditions which can never be recreated, such as the civil wars in Central America.

Even if other photographers were present in the same general area, the jury clearly understood that petitioner's photographs satisfied the requirement of uniqueness, on which they were charged. Uniqueness encompasses more than just the broad subject matter. Otherwise, Ansel Adam's "Moonrise, Hernandez, New Mexico" is only an evening western landscape, Margaret Bourke-White's "Ghandi at His Spinning Wheel" is just another photo of a politician, and Phillipe Halsman's "Einstein" is just another headshot of a college professor. Whether a photograph is "unique" or not must also reflect the selective eye of the photographer, his or her technical abilities, and the editing process of a professional photographer in identifying selects to submit to a user or stock agency.

The information a photographer chooses to include in each frame is as important as the information he or she chooses to omit. Likewise, the choice of the information selected, emphasized, or focused upon affects the uniqueness of a photographic image. The varying distance and height between the photographer and the subject creates very distinctive and unique photographs, such as the difference between a close up, a long shot or a high or low angle on a subject. The same is true for depth of field.

The Court need only consider the subject matter of Life Magazine photojournalist, Margaret Bourke-White.[11] Her pictures of assembly lines, buildings and industrial objects were unique, and are considered classic works, albeit many people took pictures of this subject matter at that time. Her industrial photographs pre-dated her later work documenting the suffering of the rural poor during the Depression, the carnage during the partition of India, or the horrors of the Nazi Holocaust, for which she became famous. *See* Silverman, *For the World to See* (Viking 1984). Under the Second Circuit's implied definition of uniqueness, had Ms. Bourke-White's factory photos been lost, they would not be "unique."

Certainly more than one photographer can have valuable photographs of the same subject. If three photographers shoot The French Open at Rolland Garos, all of them should, after editing, have valuable photographs to sell to the various magazines and interested publications. If a photograph meets the elements of technical and aesthetic quality, it has value, despite the fact that others have taken different photographs of the same subject.

This principal is the essence of the stock photography business. Different users have different needs. A stock library must contain a wide breadth of different photographs on a subject to satisfy a client. If a user is interested in a feature on the President's travels, for example, an agency could not simply send one image of the President exiting a helicopter. *Gasperini*, 66 F.3d at 429. A user requires a selection, to suit his or her layout and design concepts. Large amount of sky in a composition may be needed for

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[11] In the history of photography, Ms. Bourke-White is certainly a photographer of equal stature to Walker Evans or Alfred Eisenstaedt, whose works the Second Circuit panel obviously esteems.

copy or a masthead. A vertical may fit one layout, while a horizontal will be the only solution for another client. An architectural detail will be appropriate in a textbook, while a full view will be featured in a travel brochure.

An illuminating example is a photograph in one PACA member's library of a handshake that has sold to different users more than 300 times and its earnings, even assuming a "low" average of $175, far exceeds the $1,500 many times over. On a "cold paper record" this image would "fail" the uniqueness test. What makes this image unique is the lighting used by the photographer, setting it apart from other handshake images. Judges who did not experience the trial often miss the point that a subject as basic as a handshake has great commercial value because of the concept illustrated, such as the closing of a business deal.

IV.

A BODY OF WORK HAS VALUE GREATER THAN THE VALUE OF INDIVIDUAL TRANSPARENCIES

Recently, appellate courts have overlooked a critical factor in valuing photographs, i.e., the group value of photographs as first set forth in *Rattner* and *Hoffman*. Because damages can be substantial when a body of work is lost, appellate court's are too often quick to characterize larger jury verdicts as a "windfall" or "a winning lottery ticket" for the photographer. In doing so, the appellate courts overlook the commercial magnitude of loosing an entire body of work on a particular subject covering a span of years. This exemplifies the maxim "a whole is greater than the sum of its parts".

The importance of a body of work has long been understood by stock photo agencies. Many member

agencies specialize in areas such as science, nature, music, celebrities, news, travel or even food, in order to build large collections of a particular subject. A body of work can tell a complete story much more than one cover shot in a magazine. Agencies require complete files of a particular subject to fulfill user requests. Commercial uses for bodies of work are increasingly important and will continue to increase in importance in the digital future. Images have the reputation of "speaking a thousand words". A photograph knows no language barrier. A photoencyclopedia of modern history and politics would not be complete, for example, without the recent history of bloodshed in Central America.

Whether used on a CD-ROM, or digitized for the internet or World Wide Web, still images are irreplaceable. There is no substitute for the quality of a still image which reproduces far better than video or film images. One only has to read the newspaper to see that collections of photographs have gained importance and value. One company owed by Microsoft's Chairman, William Gates, recently purchased a member agency, Bettmann, one of the largest and oldest archives of historic and news photographs for a substantial sum. New technology has dramatically increased the future value of a body of work captured in still photography, as more and more collections are being purchased.

What apparently happened in this case, and has happened in others which involved the loss of hundreds of photographs, is that the appellate court in essence penalized the photographer for the size of the collection lost. In cases where only a handful of images are lost, jury awards are almost never reduced as unreasonable. Because users often demand to review hundreds of photographs for a large pictorial project, such as a video, textbook or encyclopedia,

the risk of loss and potential liability increases with the number of images requested. Agencies and the photographers they represent cannot afford to have large collections wiped out without fair compensation.

V.

THE WORK OF A PHOTOJOURNALIST IS AS COMMERCIALLY VALUABLE AS THE WORK OF OTHER PROFESSIONAL PHOTOGRAPHERS

The Second Circuit stated: "for all his skills as a photographer, Gasperini did not earn his living with his camera," and partly on this basis, demeaned the commercial value of his work. *Gasperini*, 66 F.3d at 429. This reveals a basic misunderstanding of the term "professional photographer" as used in the industry. "Professional photographer" includes a variety of photographers with a variety of backgrounds. A photojournalist is one type of specialist among professional photographers. Simply because a photojournalist may be better known to the general public for his words, or even voice, the photographs he takes are just as valuable in a commercial sense. The ability to produce consistently professional quality photographs by a photojournalist becomes inseparable from the written word. A photojournalist such as petitioner is paid by the Christian Science Monitor or CBS because of the entire package of skills he offers. It is often the case that an entire news crew cannot be sent to a foreign location when a story breaks, or into extremely hazardous conditions. Many journalists lead a dual career of photographer and photojournalist. Money earned from photography and money earned from writing can rarely be so neatly separated as the Second Circuit implies. The fact

that respondent requested petitioner's images for its "Conflict in Central America" series is testimony to petitioner's reputation as a professional photographer.

VI.

PAST EARNINGS FROM STOCK SALES IS NOT A RELIABLE INDICATOR OF VALUE

The Second Circuit simply did not understand that earnings from stock photography sales are generally not the most significant portion of most photographers' income in the early stages of their careers. Stock income becomes more significant over the course of a lifetime. A photographer must submit a significant body of work to be considered and accepted by a stock photography agency. It often takes a photographer many years of assignments to build up a body of work, as well as the time to carefully edit and caption the images. This is particularly true of a war correspondent like petitioner.

Past use of a photograph is simply not dispositive of value alone. The bald eagle that adorns the Unites States Postal Service truck and Express Mail envelope was in one PACA member's file unused for over eleven years before being licensed to the Postal Service for this one use for many thousands of dollars. Photographs are income earning assets, and cannot be fairly valued without considering potential future sales. The quality of film currently used will not deteriorate for at least the period of a photographer's copyright. Thus, the figure of $1,500 is both reasonable and in many cases, extremely conservative, when valuing the types of images accepted by a stock agency in its files.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit must be reversed and the jury's determination of damages reinstated in its entirety.

Respectfully submitted,

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March 1, 1996

APPENDIX

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 14

----------X

ROBERT RATTNER,

Plaintiff, Index No. 15762/84

-against-

GEO MAGAZINE and GRUNER & JAHR AG & CO., **DECISION AFTER TRIAL**

Defendants.

----------X

SHORTER, J.:

This action arises on the deposit of photo transparencies by plaintiff, a professional photographer, with defendant, a user.

Some 10 days after the deposit and in response to a telephone request defendant signed a standard form receipt which among other things provided: 39 original color transparencies of Jerusalem valued @ $2,000.00.

Subsequently and within the terms of the bailment defendant GEO Magazine forwarded the transparencies to its European colleagues Gruner & Jahr AG and they have now been lost in return transit. Plaintiff demands restitution in the amount of $78,000.00 for the loss of 39 transparencies valued @ $2,000.00. Defendant pleads that the amount of $2,000.00 is not truly liquidated damages but rather a penalty bearing no relation to true value.

FINDINGS

After extensive trial, the Court makes the following findings:

1. That the phrase value @ $2,000.00 means having a stated value of $2,000.00 each.

2. That the value of a photo transparency is an abstract concept embracing numerous factors including:

a - technical excellence;

b - the selective eye of the photographer;

c - The established prestige and earning level of the photographer;

d - uniqueness of subject matter;

e - established sales or use prices;

f - to some degree each transparency has an osmotic interaction deriving reflected value from the group.

g - the frequency of acceptance by users.

3. The photographic branch of the industry has unsuccessfully attempted since 1965 to fix the minimum value of lost transparencies at $1,500.00 each.

3a. The prevailing practice of users is to offer $200.00 to $800.00 for lost transparencies.

4. Under the U.S. Copyright Act, a photographer has the exclusive license to use his transparency for life plus 50 years (or approximately 100 years).

5. From assorted evidence before me the loosely predictable gross value of any given single transparency will range from $200.00 to $1,000.00 taking into account all the factors in paragraph #2 above.

6. Plaintiff is an established photographer of 9 years standing who has licensed transparencies at fees ranging from $50.00 to $400.00; and whose gross annual income from photography had ranged up to $15,800 at the time of loss.

CONCLUSIONS OF LAW

A. The sum of $2,000.00 stated in the contract as liquidated damages is in fact a penalty.

B. Defendant is responsible for the loss of the plaintiff's transparencies herein.

C. Plaintiff's damages must be determined in quantum meruit.

DECISION

I find for plaintiff against the defendant in the amount of $39,000.00 ($1,000.00 per transparency) with interest from February 10, 1984.

Dated: February 17, 1987
Signed: Edward J. Shorter, J.S.C.

APPENDIX B

SUPREME COURT: STATE AND COUNTY OF NEW YORK

----------X

ETHAN HOFFMAN,

Plaintiff,

Index No. 19102/85

-v-

PORTOGALLO, INC.

Defendant.

----------X

GABEL, J.:

Trial of this matter without jury was concluded before me on April 24, 1986. After submission of post-trial briefs and upon a consideration of all the evidence, I find plaintiff is entitled to judgment in sum of $486,000.00 against defendant.

Plaintiff is a photojournalist of substantial repute who left numerous rolls of film in custody of defendant for print development. Defendant is a professional photographic service catering to the needs of professional photographers (as opposed to a retail establishment such as a Fotomat store). Upon trial, it was established that when plaintiff demanded return of his negatives, defendant could not explain the whereabouts of some 324 of them. Plaintiff qualifies as his own expert in establishing the value of each negative, and assessed each at $1,500.00. Pursuant to his testimony it is apparent that each of the negatives is an income producing asset from which an image may be sold and resold many times over in the future. Some may be

sold more than others. Accordingly, the sum of $1,500.00 is a reasonable valuation of each and every missing negative.

Numerous factors go into the valuation of each negative, including technical excellence, the selective eye of the photographer, his prestige and earning level, the uniqueness of the subject matter, established sales or use prices, group value of individual images and frequency of acceptance by users. Special emphasis was given in the case at bar to the uniqueness of plaintiff's effort (the subject matter was the sex offender's unit of the Oregon State Prison Hospital), plaintiff's prestige as photo journalist and the frequency with which his work has been published (see *Rattner -v- GEO Magazine*, Supreme Ct., NY CO., NYLJ, 3/16/87 [Shorter, J]).

Defendant as bailee is liable for the full value of the negatives at the time of the conversion (*I.C.C. Metals, Inc. -v- Municipal Warehouse Co.*, 50 NY 2d 657, 431 NYS 2d 372) and it is of no consequence that defendant cannot explain what happened to the missing negatives.

There is no issue of validity of disclaimer in this case, as there is no evidence that plaintiff was given notice of defendants purported disclaimer (*Willard Van Dyke Productions, Inc. -v- Eastman Kodak Co.*, 12 NY 2d 301, 239 NYS 2d 337). In any event, it is well established that the law looks with disfavor upon purported disclaimers from one's own negligence., and the unexplained absence of plaintiff's negatives is itself sufficient for the inference of negligence to be drawn after a bailment. Nothing in the record can be taken as contributory negligence on the part of the plaintiff.

Moreover, defendant's principal witness testified that it

was a service to hold negatives. He knew he was catering to professional photographers, did not have a practice of giving receipts and had to be aware that he was dealing with the income producing assets of professional photographers (as opposed to the "snapshot" efforts of the public at large).

Finally, the testimony of defendant's other expert witness, Mr. Harry Amdur, to the effect that the disclaimer is industry wide, absolutely necessary and that the industry does not accept the $1,500.00 per negative standard for professional photographers is without value in the case at bar. Each such case must stand on its own facts due to the variables involved. Whether or not a given disclaimer is sufficient, for example, and whether it was brought home to a given photographer in a case such as this are issues which must be resolved in every similar case. One photographer's reputation might not be as well established as another's, or the income producing power of a photographer will vary, perhaps greatly from those of his colleagues (see *Rattner*, supra). There is, as yet, precious little law on these and related points (see, for example, 6 ALR 4th 931).

Settle judgment.
Dated: June 26, 1987

_____
Hortence Gabel, J.S.C.

(10)

MOTION FILED

MAR 1 1996

No. 95-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

VS.

THE CENTER FOR HUMANITIES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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---

MOTION OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Association of Trial Lawyers of America ("ATLA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae. Petitioner, through counsel, has denied consent to the filing of this brief.

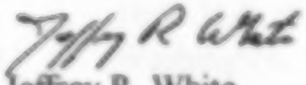
ATLA is a national voluntary bar association whose approximately 50,000 members primarily represent injured plaintiffs in civil actions. The Seventh Amendment protects the right of plaintiffs in federal courts to have their cases decided by the populace in the form of a jury. It also guarantees that jury determinations of facts will not be reassessed by federal judges. To allow judicial reassessment of jury verdicts for no reason other than excessiveness effectively eviscerates the right to trial by jury. When Seventh Amendment guarantees are curtailed or ignored, ATLA believes that we all lose a valuable right.

This case is of special interest to ATLA because it pertains to an integral part of its mission: the preservation of the right to trial by jury. ATLA has participated before this Court as amicus curiae in many significant cases concerning the preservation of Seventh Amendment guarantees. It has done extensive research into the historical roots of the Seventh Amendment and believes that it may be of assistance to the Court, especially as pertains to the historical

underpinnings of the amendment. ATLA brings to the Court a perspective that is shaped by the political philosophy that created the Bill of Rights. This is a perspective that goes well beyond the immediate concerns of the parties involved and targets the authority of both federal district and appellate court judges to review jury verdicts simply on the ground of excessiveness.

For these reasons, the Association of Trial Lawyers of America respectfully moves the Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,



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---

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of approximately 50,000 attorneys who primarily represent plaintiffs in personal injury, civil rights, and commercial law cases. A motion for leave to file this brief has been filed with the Court.

ATLA is committed to the preservation of the right to trial by jury for those seeking legal redress for injury. The increasing willingness among federal courts to set aside jury verdicts as excessive on the court's view of the weight of the

evidence and comparison with awards in other cases seriously undermines this right. ATLA views this type of excessiveness review as violative of the Seventh Amendment.

SUMMARY OF ARGUMENT

1. The lower court in this case engaged in a type of "excessiveness review" that is particularly offensive to the constitutionally protected role of the jury. Though there was no legal error or passion or prejudice on the part of the jury, the court deemed the award excessive based on its assessment of the weight of evidence, including the credibility of witnesses, and on its comparison of the verdict with awards in other similar cases. This substitution of the court's factual findings for those of the jury, especially when combined with remittitur, clearly invades the jury's province.

While federal courts have long exercized authority to set aside verdicts that were tainted by legal error, this type of reexamination of jury factual findings is relatively recent development. During the past few decades, federal district courts and courts of appeals have become increasingly willing to assume the role of "thirteenth juror," substituting their own assessment of the evidence. Courts have further usurped the jury's function by setting aside as "excessive" verdicts that exceed damage awards in other cases.

2. The Seventh Amendment preserves the role of the jury as it was defined by the common law in 1791. Common law judges had long exercised the authority to set aside jury verdicts that were tainted by misconduct on the part of the jurors.

However, the common law courts had steadfastly refused to set aside verdicts as excessive solely on the basis of the amount of the award, in the absence of a showing that athe jury was motivated by passion or prejudice. *Honda Motor Co. v. Oberg*, which addressed due process requirements imposed on the states by the Fourteenth Amendment, is not

inconsistent with this construction of the Seventh Amendment.

Any uncertainty as to the relationship between judge and jury at common law in 1791 should be resolved in favor of safeguarding the role of the jury.

3. This Court has also looked to the purpose and intent of those who drafted and ratified the Seventh Amendment as a measure of its scope. As the ratification debates make clear, the founders did not view the jury merely as a mode of trial. In their estimation, it was a political institution of vital importance to freedom and self-government.

The founders revered the jury as a bullwark against oppressive government. It represented an important element in the struggle for independence from England. The Antifederalists prevailed in their argument that the civil jury would continue to be necessary to check the power of the national government, particularly that of the federal judiciary.

The founders also viewed the jury as a positive instrument of democracy. The jury box, no less than the ballot box, was seen as an instrument of self-government. The right to sit on civil juries was viewed as an important political right.

ARGUMENT

I. JUDICIAL REVIEW OF JURY AWARDS FOR EXCESSIVENESS INVADES THE PROVINCE OF THE JURY AND UNDERMINES THE INTEGRITY OF THE CIVIL JUSTICE SYSTEM

A. Excessiveness Review Invades The Province Of The Jury.

Amicus addresses the Court solely on the third question presented by Petitioner: Whether the Seventh Amendment permits a federal appellate court to overturn a jury award as

excessive. This Court has not squarely addressed the question of the authority of federal appellate courts to review a denial of a motion to set aside a jury verdict as excessive. Jonathan Massey and Kenneth J. Chesebro, *Challenging Federal Appellate Review of Damage Awards*, Trial 52, 53 (May, 1995).

Amicus submits that the Second Circuit's order in this case was based on a reexamination of the factual findings of the jury in violation of the Reexamination Clause of Seventh Amendment, which provides that:

> no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

Amicus further suggests that the constitutional question presented in this case cannot be confined to federal appellate courts. Recognizing that the Seventh Amendment's command is addressed to *any* court of the United States, Amicus urges this Court to define the constitutional limits on the authority of federal courts to set aside jury verdicts as excessive.

The jury in this case found the Center for the Humanities liable for the loss of Gasperini's photographic transparencies and awarded damages of $450,000, based on expert testimony as to their value. *Gasperini v. Center For Humanities, Inc.*, 66 F.3d 427 (2nd Cir. 1995). The court of appeals found no legal error, misconduct by the jurors, or evidence that the jury was swayed by passion or prejudice. Rather, the court substituted its own view as to the weight of the evidence and credibility of the expert witness. *Id.* at 429. In addition, the court looked to the amounts awarded in other cases involving the value of transparencies, facts that were not before the jury. *Id.* at 430-31. The court concluded that

the verdict was excessive, warranting a new trial. The court then engaged in its own factual determination that any award totaling more than $100,000 would be excessive and entered an order of remittitur accordingly. *Id.* at 431.

Amicus refers to this type of reexamination of damage awards as "excessiveness review." Its premise is not legal error or passion and prejudice on the part of the jury. It is instead based on the court's own reassessment of the weight of the evidence at trial, including the credibility of witnesses. Characteristically, excessiveness review includes a comparison of the jury's verdict with awards in other comparable cases.

Setting aside the jury's verdict in this manner, amicus submits, represents a serious intrusion into the jury's role as finder of fact. As this Court has observed, "nothing is better settled than that . . . [in] actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991), quoting *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). Damage issues involve "[c]redibility determinations, the weighing of the evidence, and the drawing of inferences from the facts [which] are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986).

Excessiveness review is frequently coupled -- as it was in this case -- with remittitur. Amicus submits that an affirmative finding by the court of the amount of damages recoverable compounds the usurpation of the jury's function, reducing the jury's role to that of an advisor to the court.

B. Excessiveness Review Has Become Increasingly Common In Federal Courts.

Unfortunately, the lower court's reexamination of the jury's factual finding in this case is not an isolated instance. Surveys of reported decisions demonstrate that, during recent decades, a growing number of federal courts have assumed the authority to grant motions for new trial where the award was deemed excessive solely because of its size, particularly in comparison with comparable awards in other cases. *See* Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives*, 38 Case W. L. Rev. 157 (1987-88)(survey of federal district court decisions); Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237) (survey of appellate decisions).

Federal courts have long exercised the power to set aside verdicts that are tainted by legal error, including instances of jury misconduct or passion and prejudice. *See* 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶59.04[1] (2d ed. 1987). In the absence of some indication that the verdict was the product of passion, bias or prejudice or other legal defect, a new trial was not available. *See, e.g., Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (E.D.N.Y. 1976)($2.5 million verdict for professional singer who was assaulted in defendant's motel was not excessive in the absence of some showing that it was the result of passion or prejudice). It was not enough that the court believed, however strongly, that the amount of the award was too high.[1]

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[1]One treatise states that "[w]hether passion and prejudice may be inferred from the size of the verdict alone is questionable." 6A Moore's Federal Practice, *supra*, at 59-171, citing decisions that require some independent evidence that the jury was improperly swayed. *See Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94, 104 (1914)("if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of damages awarded, but to the whole case."); *Oklahoma Natural Gas Co. v. McKee*, 121 F.2d 583, 586 (10th Cir. 1941)("In the absence of clear evidence in the record that the verdict was the result of passion and prejudice, this court is without authority to review the amount of verdict in a tort action."); *see also*, Schnapper, *supra*, at 314 n.289.

Rather, the accepted view was that the trial judge "should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of the fact, he would have reached a different result." 6A Moore's Federal Practice, *supra*, at 59-149 & n.14 (collecting authorities). In those instances where the verdict has been tainted by passion or prejudice, remittitur has generally been regarded as inappropriate. *Minneapolis & St. Paul Ry. Co. v. Moquin*, 283 U.S. 520 (1930), consistent with the notion that the verdict was legally erroneous, not merely factually incorrect.

In recent decades, however, an increasing number of courts have cast off the restriction limiting them to remedying the effects of a legally tainted verdict and have undertaken a factual review of the jury's damage award. *See, e.g., Brown v. Syntex Labs*, 755 F.2d 668 (8th Cir. 1985)(the district court's determination that the verdict was excessive was properly based on evaluating the evidence and weighing the credibility of the witnesses); *Howell v. Marmpegaso Compania Naviera*, 536 F.2d 1032 (5th Cir. 1976)(the jury's verdict was deemed excessive, warranting remittitur, though the court did not believe the verdict was by passion or prejudice). "Indeed it is declared by some courts that on motion for new trial they sit as a 'thirteenth juror.'" 6A Moore's Federal Practice, *supra*, at 59-164.

The lower court did not infer passion or prejudice from the size of the award in this case. Indeed, resort to such an inference is apparently infrequent, as courts prefer closer scrutiny of the amount of the award, combined with routine use of remittitur to avoid actually having to go through with a new trial. *See* Schnapper, *supra*, at 315-16; Sann., *supra*, at 187-88.

As the case before this Court demonstrates, excessiveness review is not limited to the district courts. One commentator has stated:

> The major controversy in this area of the law concerns whether, if a jury has obeyed the instructions and arrived at a verdict in a fair and unbiased manner, an appellate court can nevertheless direct a new trial merely because the judges believe the jurors made a factual mistake. Today the vast majority of appellate decisions overturning jury verdicts are made on the ground that the jury purportedly made such a good faith error.

Schnapper, *supra*, at 316.

Excessiveness review does not target awards that are so great as to "shock the conscience" of the court. It is clear from the amounts involved in many cases that these courts are simply substituting their own factual findings for the jury's. For example, in *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960), the court found $315,000 excessive for the wrongful death of 39-year-old and offered plaintiff a remittitur to $235,000. *Compare Knight v. Texaco*, 786 F.2d 1296 (5th Cir. 1986)(affirming remittitur of 17.6% of jury verdict); Sann, *supra*, at 187-88 n.116 (citing examples of remittiturs ranging from 15% to 30% of jury verdict).[2]

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[2]Remittitur, when employed in conjunction with excessiveness review, is particularly unfair to plaintiffs. The notion that plaintiff enjoys a free choice between a new trial and a reduced award is, at best a polite fiction. Injured plaintiffs are often in financial straits precisely because of their injury, so that the cost of delay and the risk of an adverse decision at the hands of the second jury is simply too great. Trial judges, aware of these pressures, probably employ remittutur in many cases where they would not enter a new trial alone. Even if plaintiff opts for a new trial and obtains a similar verdict from the second jury, he or she faces the prospect of yet another remittitur from the court. Additionally,

Courts employing excessiveness review generally arrive at such figures by resorting to verdicts rendered or upheld in other cases. An example is *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151 (5th Cir. 1985). Following a $1.5 million verdict to the widow of an air crash victim, the trial judge ordered remittitur to $1 million. The court of appeals found that figure was excessive and directed a new trial unless the plaintiff agreed to a remittitur of $500,000. In making this finding, the court made no reference to the evidence in the case, but relied on comparable awards in other cases. Similarly, in *Gaston v. Aqua Slide 'N' Dive Corp.*, 487 F. Supp. 16, 18-19 (E.D. Tenn. 1980), a products liability case, the district court found that the verdict of $1,250,000 for permanent paralysis was "out of line with the verdict in other cases . . . . A reasonable verdict, and one in line with other cases . . . would be $1,000,000." *See also* Sann, *supra*, at 206 n.206 (summarizing decisions evincing similar reliance on other awards).

Reexamining the verdict on the basis of facts that were not presented to the jury is particularly offensive to the jury's role. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109 (4th Cir. 1991)(suggesting that the practice violates the Seventh Amendment); Charles Jared Knight, *State-Law Punitive Damage Schemes And The Seventh Amendment Right To Jury Trial In The Federal Courts*, 14 Rev. Litig. 657 (1995).

In effect, the court treats the jury's decision as advisory, effective only if it falls within the "schedule" of permissible awards represented by the results in prior cases. More fundamentally, the assumption that a limb or a loved one has about the same value for any plaintiff contradicts the principle

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is no corresponding remedy of additur in federal courts. One scholar observes: "For many plaintiffs, this essentially amounts to blackmail, with the verdict being held hostage." Sann, *supra*, at 201.

of individual justice that underlies the jury system. "Such an approach clearly usurps the function of the jury." Sann, *supra*, at 206.

Once the boundary is breached between review for legal taint and overt reexamination of the jury's factual findings, there is little to restrain courts from progressively greater intrusions into the jury's function. "Prior to 1933, the Supreme Court had insisted on at least a dozen different occasions that neither the appellate courts nor the Supreme Court itself had any authority to overturn a jury verdict because it appeared either too large or inadequate." Schnapper, *supra*, at 316 (citing cases). Currently, a majority of circuits "now recognize that they may reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict." Moore's Federal Practice, *supra*, at 59-185.

> [A] large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.

Schnapper, *supra*, at 354.

Amicus submits that it is precisely this kind of judicial usurpation of the jury's function that the Seventh Amendment was designed to proscribe.

II. EXCESSIVENESS REVIEW VIOLATES THE SEVENTH AMENDMENT.

A. Authority of Common Law Courts to Grant New Trials was Limited to Verdicts Tainted by Legal Error or Jury Misconduct.

Amicus submits that the lower court's excessiveness review, not based on the presence of legal error or passion or prejudice, but on the court's own factual determination of damages, violates the command of the Reexamination Clause of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This Court has instructed that "to ascertain the scope and meaning of the Seventh Amendment resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973). As it happens, the scope and deference that common law courts accorded to the jury's role as finders of fact reached their apex during that period.

One of the most deeply entrenched principles of the common law was that the assessment of damages in unliquidated claims is the responsibility of the jury. 3 William Blackstone, Commentaries *397. However, the English courts did exercise authority to set aside a jury's verdict and order a new trial.

The progenitor of the new trial order was the writ of attaint. As early as 1202 A.D., that procedure permitted a jury of 24 persons to inquire into whether the petit jury had given a false verdict. If so, the judgment was reversed and the first

jurors were severely punished with forfeiture of all lands and property. Blackstone, *supra*, at *402-05; Lloyd E. Moore, The Jury 58-59 (1973). The punishment of jurors reflected the premise that the jurors had tainted the verdict by misconduct in the nature of perjury. William Forsyth, History of Trial by Jury 152 (Burt Franklin ed. 1971)(1878); E.W. Hinton, *Power of Federal Appellate Court to Review Rulings on Motion For New Trial*, 1 U. Chi. L. Rev. 111, 112 (1933).

By the 16th Century, attaint was no longer in use, having been replaced by statutory fines and imprisonment of jurors who were guilty of misconduct. Imprisoning jurors was outlawed by Act of Parliament in 1667, and finally came to an end after Bushnell's case in 1670. Moore's Federal Practice, *supra*, at 59-74; Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.Q. 579, 583-86 (1993). However, the authority of common law judges to set aside jury verdicts continued to reflect its origin in the writ of attaint, resting on the proposition that juror misconduct tainted the outcome. Lord Eyre explained in 1793:

> The admissibility of the evidence being established, the question of how far it conduces to the proof of the fact which is to be ascertained is not for the Judge to decide, but for the jury exclusively; with which Judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in attaint on motions for new trials.

Gibson v. Hunter, 2 H. Bl.187, 205 (1793).

B. Common Law Courts Did Not Engage in Excessiveness Review

The first reported grant of a new trial based on the excessiveness of the verdict was *Wood v. Gunston*, 82 Eng.

Rep. 867 (K.B. 1655). Although the opinion did not describe the specific act of misconduct on the part of the jury, the order was based "on the assumption that the jury must have been prejudiced." E.W. Hinton, *Power of Federal Appellate Court to Review Rulings on Motion For New Trial*, 1 U. Chi. L. Rev. 111 (1933). "The statement in the opinion that 'It is frequent in our books for the court to take notice of miscarriages of juries and to grant new trials upon them' probably refers to the misconduct cases." *Id.* at 112.

It is clear that the common law courts did not claim authority to set aside a jury's assessment of damages solely on the judge's conviction that the award was excessive, whether based on reassessing the weight of the evidence or comparing the verdict to other similar awards. In *Beardmore v. Carrington*, 2 Wils. 244, 95 Eng.Rep. 790 (C.P. 1764) the court asserted that "there is not one single case (that is, law) in all the books to be found where the Court has granted a new trial for excessive damages in actions for torts." *Id.* at 249, 95 Eng.Rep. at 793.[3]

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[3]The Court in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ___ (1994) declined to accept *Beardmore* for the proposition that English courts *never* set aside verdicts as excessive because common law courts at that time could order a new trial on the basis of passion and prejudice, including cases where damages "may be so monstrous and excessive, as to be, in themselves, an evidence of passion or partiality in the jury." 512 U.S. at ___, quoting *Fabrigas v. Mostyn*, 2 Black.W. 929, 96 Eng.Rep. 549 (C.P. 1773).

Amicus reads the quoted passage from *Beardmore* court as referring to the type of excessiveness review at issue in this case, where there is no passion or prejudice. *See, e.g., Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620, 624 (S.D. Tex. 1983)("The Court concludes that the jury verdict was not the result of passion or prejudice but is beyond the maximum award supported by the evidence.") This interpretation is not at odds with that of the majority in *Oberg*.

This broad rejection of excessiveness review is echoed in *Swain v Hall*, 3 Wils. K.B. 45, 95 Eng. Rep. 924, 925 (C.P. 1770):

> Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the Court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the Court hath never granted new trials, notwithstanding the Judge before whom the cause was tried hath been of opinion, that the strength and weight of evidence was against the verdict. . . . although I am still of opinion, that the weight of evidence was with the plaintiff, yet I disclaim any power to controul the verdict of the jury, who are the legal constitutional judges of the fact.

Further indication that common law courts did not claim authority to reexamine jury damage awards for excessiveness is the decision in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763), a suit for damages against government agents who attempted to prevent publication of John Wilkes' allegedly seditious pamphlet. Although the damages awarded were great in comparison with the actual harm suffered, the court's reluctance to interfere with the verdict prompted the court to expand the jury's authority to include exemplary damages. *See* Linda Schlueter & Kenneth Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

The relationship between common law judges and juries was clearly defined by 1791: Courts could and did order new trials where the jury had been guilty of misconduct, including

passion and prejudice.[4] But judges lacked authority to substitute their own assessment of damages.

Lord Mansfield once asserted: "Trials by jury, in civil cases, could not subsist now without a power, *somewhere*, to

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[4]This Court's decision in *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994) does not foreclose this issue. The majority there determined that the common law provided for judicial review of the size of punitive damage awards, and held that Oregon's elimination of such review, even for verdicts tainted by passion or prejudice, violated procedural due process. Id. at 2340-41.

Because *Oberg* addressed the procedural due process obligations imposed on the states by the Fourteenth Amendment, the relevant period of the common law, extended to 1868. Many of the decisions discussed by the Court dated from the 19th Century, including Justice Story's leading decision in *Blunt v. Little*, 3 F.Cas. 760 (C.C. Mass. 1822).

Unhappily, by the mid-19th Century, judges in both England and America had made serious inroads on jury's role, particularly in tort cases, "to better serve the needs of the business elite in an industrializing society." Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.Q. 579, 605 (1993). As the majority acknowledged:

> Judicial deference to jury verdicts may have been stronger in 18th century America than in England, and judges' power to order new trials for excessive damages more contested. See Nelson, The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich. L. Rev. 893, 904-917 (1978); M. Horwitz, The Transformation of American Law, 1780-1860, p. 142 (1977). Nevertheless, because this case concerns the Due Process Clause of the Fourteenth Amendment, 19th century American practice is the "crucial time for present purposes." *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 611 (1990).

114 S. Ct. at 2342 n.12.

More importantly, "the strictures of the Seventh Amendment" impose more stringent controls on federal courts reviewing damage awards than may be required in state courts. *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 279 & n.26 (1989); *see also, Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415 (4th Cir. 1992).

grant new trials." *Bright v. Eynon*, 1 Burrow 390, 3 Bl. Com. 388 (1757). The corollary proposition, was pointed out by a later commentator on that case:

> No one supposed or claimed for one moment, that the English common-law jury could exist under a system of law that allowed an appeal from a verdict of a jury to a bench of judges with affirmative judicial power to find the same fact in issue different from the finding of the jury, albeit on the same evidence.

Henry Schofield, *New Trials and the Seventh Amendment – Slocum v. New York Life Insurance Co.*, 8 Ill. L. Rev. 287, 303 (1913).

C. Any Uncertainty As To the Relationship Between Judge and Jury At Common Law in 1791 Should Be Resolved in Favor of Safeguarding the Role of the Jury.

Unfortunately, we cannot hope to develop a perfect snapshot of the common law as it existed in 1791. The historical record is simply too sparse. Wolfram, *supra*, at 652 n.43. Amicus suggests that the broad presumption this Court has required in favor of the right to trial by jury applies with equal force to the Seventh Amendment's Reexamination Clause:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948, 952 (1959). For that reason, Justice Blackmun advised, "uncertainty in the historical record should lead us . . .

to give the constitutional right to a jury trial the benefit of the doubt." *Granfinaniera, S.A. v. Nordberg*, 109 S. Ct. at 2816 (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1353 (1990)(Brennan, J., concurring).

III. HISTORICAL IMPORTANCE OF CIVIL JURY REQUIRES BROAD APPLICATION OF THE SEVENTH AMENDMENT PROHIBITION AGAINST JUDICIAL INTERFERENCE WITH THE JURY

This Court has not relied solely on the historical record left by the common law judges of England, but has looked to the understanding and intent of those who framed and ratified the Constitution. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting)("the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the amendment was adopted.").

That historical context demonstrates that those who fought for preservation of the civil jury did not view it as merely -- or even predominantly -- a method "to assure a fair and equitable resolution of factual issues" in civil cases. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973). As scholars have concluded on the basis of the historical records of the period, the civil jury, and most especially the right to serve on civil juries, was viewed as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner, *Judicial Assessment of Punitive*

Damages, and the Politics of Jury Power, 91 Colum. L. Rev. 142 (1991).

A. The Framers Of The Seventh Amendment Viewed The Civil Jury As An Essential Bulwark Against Oppressive Government.

On Sept 12, 1787, as the Constitutional Convention was nearing the end of its work in Philadelphia, Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." On Sept. 15, it was proposed to add to the Article III guarantee of jury trial in criminal cases: "And a trial by jury shall be preserved as usual in civil cases." The motion failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (Dec. 1966).

The representatives at the Constitutional Convention, however, seriously underestimated Americans' passionate devotion to the institution of the civil jury. This omission, coupled with the grant of appellate jurisdiction to the Supreme Court in Art. III §2, cl. 3 over issues of fact and law, suggested to many that the constitution represented "virtual abolition of the civil jury." Henderson, *supra*, at 295; Wolfram, *supra*, at 672 n.89. This threat to the civil jury very nearly doomed ratification of the entire constitution.

1. The right to trial by jury in civil cases was an important element in the struggle for independence.

In large part, the reverence of Americans for the institution of the jury at this time reflected its role in the recent struggle against oppression by the English crown. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. *See* John Guinther, The Jury in America ch. 1 (1988)

In 1688, a jury acquitted seven Anglican bishops of seditious libel for signing a letter in opposition to James II. This case elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The civil jury's role in assessing damages in civil cases was also of great interest to Americans. They followed the lawsuits of John Wilkes and his printer against officials bent on preventing his allegedly seditious publication. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). The court there declined to set aside the large award, recognizing the jury's authority to award exemplary damages. "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies. South Carolina went so far as to provide Wilkes monetary support for one of his political campaigns." Landsman, *supra*, at 591. Wilkes' case was cited in debates in support of the need for constitutional protection of the civil jury. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

At the same time, the colonists found themselves frequently deprived of civil jury rights. A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-

11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957).

The colonists also faced infringement of the jury's role in assessing damages in civil cases. For example, the anti-federalist Judge Bryan described the civic upheaval that resulted from the reassessment of a jury's damage award by New York's colonial governor:

> The attempt of Governor Colden, of New York, before the revolution to re-examine the facts and reconsider the damages, in the case of Forsey against Cunningham, produced about the year 1764, a flame of patriotic and successful opposition, that will not easily be forgotten.

2 THE COMPLETE ANTI-FEDERALIST 149 (H. Storing ed. 1981).

The colonists complained of these infringements through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. "Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies." Landsman, *supra*, at 596.

2. The adoption of the Seventh Amendment was crucial to ratification of the Constitution.

So highly regarded was the civil jury in the public mind at the time the Constitution was drafted that the absence of an explicit guarantee of civil jury rights was viewed by many as sufficient reason to reject the entire document. Alexander Hamilton observed:

> The objection to the plan of the convention, which has met with most success in [New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.

THE FEDERALIST No. 83, at 495 (C. Rossiter ed. 1961). Justice Story subsequently recounted that the absence of this guarantee in the proposed Constitution "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

During the ratification debates in the various states, the Antifederalists, repeatedly expressed their fear that, absent some specific constitutional provision to the contrary, the new federal Congress could eliminate jury trials in civil cases in the federal courts. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 Univ. of Pa. L. Rev. 965, 971 (1980); *see, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Ratifying conventions in seven states adopted resolutions calling for an amendment guaranteeing the civil jury trial. Scheiner, *supra*, at 146.

Ultimately, the antifederalist arguments prevailed on this issue: the Federalists promised the enactment of a Bill of Rights, including civil jury rights, to win support for the constitution. "As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the

people." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830)

Amicus submits that the great value placed upon the civil jury by the framers warrants broad application of the Seventh Amendment to guard against the erosion of its authority. As Professor Arnold states:

> That special affection for the jury ought to be viewed as relevant not just to the fact that jury trial was "preserved" in the Constitution; it is relevant as well to interpreting the scope of the actual provision, for it gives the right granted an aura, and the Constitution a meaning, they would not otherwise have if the institution of jury trial had been regarded more or less indifferently.

Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Cases*, 128 Univ. of Pa. L. Rev. 829, 831 (1980).

B. The Framers Intended the Seventh Amendment As a Check on the Power of the Federal Judiciary.

Independence from England did not diminish the need for civil juries, the Antifederalists argued. The Antifederalists harbored grave fears that the new national government would necessarily fall under the control of a small elite of moneyed interests. There was no question that the unelected, life-tenured federal judiciary would be selected from and would serve that elite. "Judges, unincumbered by juries, have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to ... those who wish to enslave the people." 3 THE COMPLETE ANTI-FEDERALIST 49 (An Old Whig).

Even well-intentioned judges can pose a danger to the rights of common people, the Antifederalists asserted. They cited Blackstone, who cautioned that judges will frequently have a bias toward those of their own rank. Landsman, *supra*, at 600. The civil jury, therefore, would serve as a bulwark against private as well as public oppression. Scheiner, *supra*, at 152.

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judge. *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.") Moreover, the framers clearly expected that "the jury would reach a result that the judge either could not or would not reach." Wolfram, *supra*, at 671; Paul B. Weiss, *Reforming Tort Reform: Is there Substance to the Seventh Amendment*, 38 Catholic U. L. Rev. 737, 747 (1989). And they intended the Seventh Amendment to preserve the jury's right to do so.

On this point, Justice Black, dissenting in *Galloway v. United States*, quoted Patrick Henry, speaking in the Virginia Constitutional Convention:

> Trial by jury is the best appendage of freedom. We are told that we are to part with that trial by jury which our ancestors secured their lives and property... I hope we shall never be induced by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.

319 U.S. 372, 396 (1943)(Black, J., dissenting).

Amicus submits that to confer upon federal judges the power to "correct" the jury's "mistakes" in assessing damages directly undermines the framers' design.

C. The Framers Viewed Participation in Civil Jury Trials as an Important Exercise in Democratic Self-Government.

de Toqueville astutely recognized that the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." Alexis de Tocqueville, Democracy in America 293 (Bradley rev.ed. 1945). The role of the jury as an instrument of self-government has been well recognized. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943)(Black, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979)(Rehnquist, J., dissenting).

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror. *See generally,* Vidram David Amar, *supra,* at 218.

> In early colonial times, [the jury] was the essential instrument of governance, providing one of the few experiences common to virtually every citizen. In Massachusetts, for example, one historian characterizes the jury as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and colonial legislature. William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were

> fundamental prerequisites to majoritarian self-government. As the state legislators would protect their constituents against oppression by the central government, so too jurors could be expected to "interpose" themselves against the central tyranny through the devices of presentments, nonindictments, and general verdicts. Indeed, the ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1186, 1188 (1991). Jefferson ventured that "[w]ere I called upon to decide whether the people had best be omitted in the Legislation or Judicial department, I would say it is better to leave them out of the Legislative," quoted in *Id.* 100 Yale L.J. 1188.

The jury role in self-government was all the more critical to the Antifederalists, who viewed the Constitution as an essentially aristocratic document, creating a Congress that would serve the elite and possess "an insufficient sense of sympathy with, and connectedness to, ordinary people." *Id.* at 1140. Popular representation in the judicial branch was needed so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, at 91 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the adminstration of government." Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981).

In the words of the "Federal Farmer," the leading Anti-Federalist essayist of the ratification period:

> It is essential in every free country that common people should have a part and share of influence, in the judicial as well as in the legislative department...

> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature... have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels and guardians of each other.

2 THE COMPLETE ANTI-FEDERALIST 249-50.

Through the jury, citizens would learn self-government by doing self-government. Akhil Reed Amar, *supra*, at 1196. Alexis de Tocqueville analogized the jury to:

> . . . a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties... I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ. . . .

1A. de Tocqueville, at 295-96. "I do not know whether the jury is useful to those who have lawsuits," he reported, "but I am certain its is highly beneficial to those who judge them." *Id.*

To permit federal judges to reduce jurors in civil trials to the status of tolerated advisors, as the lower court surely did in this case, would deprive Americans of the important role in their government that was intended for them by the Founders.

CONCLUSION

For these reasons, Amicus urges the Court to reverse the order of the lower court in this case.

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FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM GASPERINI,
Petitioner,
v.
THE CENTER FOR HUMANITIES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

When a defendant, following a jury verdict in federal district court, moves for a new trial on the grounds that the jury awarded excessive damages, and the district court denies the motion, may a federal court of appeals review that determination and, if so, under what standard of review?

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WILLIAM GASPERINI,
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BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

INTERESTS OF THE AMICI

The amici are trade associations representing the interests of many of the life and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance is the largest life insurance trade association in the United States, representing the interests of more than 580 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in the United States.

[1] Counsel for both the Petitioner and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

The American Insurance Association represents 280 property and casualty insurers, which employ more than 150,000 people, write $60 billion in premiums annually, and pay nearly $2.2 billion annually in state taxes and licensing fees.

Preserving the power of federal appellate courts to review the denial of new trial motions, where such motions were premised upon the excessiveness of a jury's damages award, is an issue of vital importance to the *amici*'s members. In recent years, the size of such awards (particularly punitive damages awards) has increased sharply, and in some cases, federal district judges have erroneously refused to grant a new trial when the damages were clearly excessive. The *amici* have previously filed a number of briefs in this Court on the issue of excessive punitive damages awards. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief addresses the third question presented by the petition for certiorari: whether, and under what circumstances, a federal appellate court may reverse a federal district court's decision to deny a new trial where the defendant has claimed that the jury awarded excessive damages. The *amici* contend that a federal appellate court may do so (and order a new trial, with or without a conditional remittitur) when, making all reasonable inferences in favor of the plaintiff, no reasonable jury could have awarded the amount of damages that the jury did.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

1. Because respondent sets the facts forth fully in its brief, the *amici* only summarize the facts here. Respondent The Center For Humanities, Inc. ("the Center") borrowed 300 original slide color transparencies from petitioner William Gasperini ("Gasperini") for use in producing an educational videotape entitled *Conflict in Central America*. Brief for Petitioner ("Pet. Br."), at 2. Gasperini lent the Center these transparencies, which came from his private collection of more than 4700 photographs of Central America, in exchange for royalty payments. Joint Appendix ("J.A."), at 179, 359-361. The Center was to return the transparencies to Gasperini upon completion of the videotape, but was unable to do so because it lost them. Pet. Br. 2.

2. Gasperini filed an action seeking damages for his lost transparencies in the United States District Court for the Southern District of New York ("the district court"). Pet. Br. 1-2. Jurisdiction was predicated on diversity of citizenship. *Id.* The Center admitted that it was liable for losing the transparencies, and the trial was consequently limited to the issue of compensatory damages. J.A. 61.

New York law requires that in assessing damages for lost transparencies, the finder of fact consider the uniqueness of the transparencies and the earning level of the photographer. Appendix to Petition for Certiorari ("Pet.

App."), at 5a. Gasperini did offer evidence that some of his photographs were unique, but did not even attempt to prove that the vast majority of the photographs were unique; indeed, he acknowledged that "[u]sually there were" other photographers present when he was taking pictures. J.A. 197. And, with respect to Gasperini's earnings as a photographer, he testified that his income from marketing his photographs had ranged from a "few hundred" to a "few thousand" dollars a year and that in the ten years preceding the trial, his total earnings from doing so had been approximately $10,000. J.A. 150-151; Pet. Br. 3; Pet. App. 5a. Gasperini was permitted, over the Center's objection, to introduce evidence that the "industry standard" for valuing lost transparencies was $1,500 per transparency. Pet. App. 4a. However, whether an "industry standard" exists is at best a question of fact, to be determined with reference, *inter alia*, to the uniqueness of the transparencies and the earning level of the photographer. *Id.* at 4a-5a. It was the district court's opinion, at the close of all the evidence, that "the evidence in this case is very clear that there is no industry standard." J.A. 280.[2]

Despite the district court's instructions to consider the uniqueness of the photographs and the earning level of the photographer, the jury simply awarded Gasperini $450,000 (representing the "industry standard" of $1,500 per transparency multiplied by 300 slides). J.A. 313.

3. The Center moved for a new trial or remittitur, pursuant to Fed. R. Civ. P. 59, on the grounds that the jury's award was excessive. Pet. App. 11a-12a. The district court denied the motion without comment. *Id.* at 12a.

4. The Center appealed to the United States Court of Appeals for the Second Circuit ("the court of appeals"), which reversed, and ordered that Gasperini either accept

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[2] This comment was made outside the presence of the jury. J.A. 275, 280.

a reduced award of $100,000 or submit to a new trial on damages. Pet. App. 10a. The court of appeals made clear that it was "[d]rawing all reasonable inferences in favor of Gasperini" and "[g]iving Gasperini every benefit of the doubt" (*id.* at 9a), but that, even so, "Gasperini failed to make a showing" with respect to either the uniqueness of the transparencies or his earning level as a photographer that would be "sufficient to sustain the jury's verdict." Pet. App. 5a. In particular, the court of appeals held, among other things, that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." *Id.*

SUMMARY OF ARGUMENT

I. This Court has long recognized that federal courts (including federal appellate courts) may grant judgment as a matter of law where the evidence introduced at trial would not permit a reasonable jury to find to the contrary. Federal appellate courts have that power because the Seventh Amendment requires only that the jury be allowed to make *reasonable* inferences from the evidence before it. Consequently, when a defendant has moved for a new trial on the grounds that a federal jury awarded excessive damages, and the district court denies the motion, the Seventh Amendment does not prevent federal appellate courts from ordering a new trial (with or without a conditional remittitur) if, making all reasonable inferences in favor of the plaintiff, a reasonable jury could not have awarded the amount of damages that the jury did.

Currently, all of the circuits review a district court's decision to deny a motion for new trial, on the grounds that the jury awarded excessive damages, under an "abuse of discretion" standard. At least three circuits have expressly defined that standard in terms of the "reasonableness" test described above, and there is good reason to

believe that other circuits also define "abuse of discretion" in that way.

Gasperini suggests that if federal appellate courts are allowed to review for "abuse of discretion," they should be permitted to reverse only in cases where there is a complete absence of evidence to support the size of the verdict. However, it is well established, under this Court's prior decisions, that even when a party has introduced some evidence to support its position, that evidence may be legally insufficient to support a verdict in the party's favor. The proper question is not whether there is *any* evidence to support the amount of damages awarded by the jury, but whether there is legally *sufficient* evidence to support the award.

II. There is ample historical support for concluding that the Seventh Amendment does not prevent federal appellate courts from ordering a new trial because of a jury's excessive damages award. At the English common law, prior to 1791, cases were often tried before a single *nisi prius* judge (the analogue of a modern federal district court), and new trials could then be granted by a four-judge trial court sitting at Westminster (the analogue of a modern federal court of appeals). Gasperini and his *amici* attempt to undermine this analogy by contending (1) that it makes no more sense to analogize the four-judge trial court to a modern federal appellate court than it would to argue that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination and (2) that, in any case, the four-judge trial court would not grant a new trial, for excessive damages, in cases where the *nisi prius* judge felt that a new trial was unwarranted. Both of these contentions lack merit. First, federal district courts *do* cease to act as trial courts when they review cases tried in bankruptcy courts or before federal magistrates. Second, even if it is true that the four-judge trial court could not grant a new trial, for excessive damages, against the wishes of the *nisi prius* judge (which is questionable),

any such restriction can reasonably be explained by the fact that the four-judge panel had to rely upon the *nisi prius* judge for information about what had occurred at trial. Because modern federal appellate courts have access to a complete and independent record of the trial proceedings, they do not need to rely upon the federal district judge in the same way, and to bar them from overruling district judges on this issue would make no sense. The Seventh Amendment preserves only the "fundamental elements" of jury trial—not limitations that stem merely from the "exact procedural incidents or details of jury trial" in 1791.

III. The court of appeals, in this case, reversed the district court's denial of the Center's motion for new trial because it determined that, making all reasonable inferences in favor of Gasperini, a reasonable jury could not have awarded the amount of damages that this jury did. Review under such a standard does not violate the Seventh Amendment.

ARGUMENT

I. THE SEVENTH AMENDMENT DOES NOT PREVENT A FEDERAL APPELLATE COURT FROM REVERSING A FEDERAL DISTRICT COURT'S DECISION TO DENY A NEW TRIAL ON THE GROUNDS OF EXCESSIVE DAMAGES, IF THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO AWARD DAMAGES IN THAT AMOUNT

A. When, Making All Reasonable Inferences In Favor Of The Plaintiff, No Reasonable Jury Could Have Awarded The Amount Of Damages That The Jury Did Award, That Award Is Excessive As A Matter Of Law, And It Does Not Violate The Seventh Amendment For A Court Of Appeals To Order A New Trial

The Re-Examination Clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law," clearly prohibits a federal court of appeals from overturning a jury's resolution of disputed facts. However, it does not prohibit the court from examining the evidence to determine whether a rational trier of fact could have reached the verdict arrived at by the jury. Consequently, where a federal district court has denied a motion for new trial on grounds of excessive damages, the Seventh Amendment does not prohibit the court of appeals from determining whether the amount of damages awarded exceeds that which a rational trier of fact could have awarded and whether, as a result, the district court has abused its discretion by refusing to order a new trial.[3]

It is well established, under this Court's precedents, that the Seventh Amendment permits federal courts (including appellate courts) to "direct a verdict for insufficiency of evidence." *Galloway v. United States*, 319 U.S. 372, 389 (1943) (stating that the Court had repeatedly so held "for nearly a century"); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967) ("As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does"). The reason that the court of appeals has this power is that the jury's discretion, as the finder of fact, is not untrammeled. It must be exercised reasonably. As the Court held in *Galloway*, the Seventh Amendment requires only "that the jury be allowed to make *reasonable* inferences from facts proven

[3] As Gasperini acknowledges, federal district courts have broad discretion to grant a new trial, and may do so even where the evidence was legally sufficient to justify the jury's verdict, on the grounds that the verdict was against the weight of the evidence. Pet. Br. 38. The *amici* do not claim a similar breadth of discretion for federal appellate courts—only the power, as defined above, to act in those cases where the district court has abused its discretion.

in evidence having a *reasonable* tendency to sustain them." 319 U.S. at 396 (emphasis added).

Consequently, where a federal district court has denied a motion for new trial, made on the grounds that the jury awarded excessive damages, there is nothing in the Seventh Amendment to prevent the court of appeals from determining whether the jury acted rationally in awarding the amount of damages that it did.[4] In doing so, the court of appeals may appropriately apply the same standard of review that it would use in reviewing the denial of a motion for judgment as a matter of law: i.e., whether, making all *reasonable* inferences in favor of the plaintiff, *reasonable* persons could not, in light of the evidence, have arrived at the verdict that the jury did. *E.g.*, *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir. 1984), *cert. denied*, 496 U.S. 871 (1984).[5] If the verdict exceeds what a rational trier of fact could have awarded, then the district court has clearly abused its discretion in failing to order a new trial, and the court of appeals should be permitted to

[4] This Court held, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989), that it is not the role of the Court (or, presumably, other federal appellate courts) "to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioner's motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur." However, as a practical matter—and particularly in cases such as the present one, where the district court denied the defendant's motion for new trial without comment (*see* Pet. App. 12a)—the only way to determine whether the district court abused its discretion is to determine whether, upon the evidence presented at trial, the jury's award was rational.

[5] Comparing the jury's award with awards made in other cases or legislative penalties for similar misconduct can provide useful guidance in this regard, although such data is of course not dispositive.

require such a trial (with or without a conditional remittitur).[6]

Gasperini argues that if a defendant believes there is insufficient evidence to justify a rational trier of fact in awarding damages above some particular amount, the defendant should simply move for judgment as a matter of law, before the case goes to the jury, asking that the jury be limited to awarding no more than that amount of damages. Pet. Br. 39-40. However, under the procedure suggested by Gasperini, the court of appeals would often be powerless to disturb jury awards that it deemed to be excessive as a matter of law. For example, if the defendant had moved for judgment as a matter of law on damages, arguing that damages could not rationally exceed $1 million (a motion that the district court denied), and the court of appeals felt that the jury could rationally have awarded as much as (but no more than) $1.25 million, the court of appeals would be powerless to disturb an award of $20 million, despite its conclusion that the award was excessive as a matter of law. Nor does the fact that the defendant and the court of appeals might disagree about the precise limits of what is reasonable mean that all awards, in any amount whatsoever, are therefore reasonable as a matter of law. Indeed, with respect to punitive damages awards, this Court has held both (1) "that the Constitution imposes a substantive limit on the size of punitive damage awards" (a limit that even Gasperini's *amici* acknowledge is "arguably legal" in nature[7]) and (2) that it can nonetheless be difficult to "'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.'" *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

[6] Offering the option of a remittitur, as the Second Circuit did in this case, merely increases the plaintiff's range of choices, without depriving him or her of the right to a new trial.

[7] Brief of Federal Jurisdiction and Legal History Scholars ("Scholars' Br."), at 20.

B. At Least Some Federal Courts Of Appeals Do Employ This Standard Of Review When Reviewing A District Court's Decision To Deny A Motion For New Trial On The Grounds That Damages Were Excessive

All of the circuits have, for many years, exercised the power to review a district court's denial of a motion for new trial, where the grounds for such motion were that the damages awarded by a jury were either excessive or inadequate. 11 Charles A. Wright *et al., Federal Practice and Procedure* § 2820, at 209 (2d ed. 1995); 6A James W. Moore *et al., Moore's Federal Practice* ¶ 59.08[6], at 59-175 (2d ed. 1995). Most of those courts, in doing so, state that they are reviewing the district court's decision for "abuse of discretion." Wright, *supra*, § 2820 at 212-213; Moore, *supra*, ¶ 59.08[6], at 59-177. Although the courts of appeals are not always specific about the precise methods that they are using in determining whether the district court "abused its discretion," it appears that at least some circuits do employ the standard of review urged by the *amici*: namely, whether, making all reasonable inferences in favor of the plaintiff, reasonable persons could not, in light of the evidence, have arrived at the verdict that the jury did.

The First, Fifth, and Seventh Circuits have expressly acknowledged their use of such a standard. *See, e.g., Anthony v. G.M.D. Airline Services, Inc.*, 17 F.3d 490, 493 (1st Cir. 1994) (in determining whether the trial court abused its discretion by refusing to set aside a verdict as excessive, the court will view the evidence on damages "in the light most favorable to the plaintiff" and find an abuse of discretion "only if the jury's verdict exceeds 'any rational appraisal or estimate of the damages

that could be based on the evidence before the jury' ") (citations omitted); *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 178 (5th Cir. 1992) ("the district court abused its discretion when it denied [defendant's] motion for remittitur because the damages were excessive as a matter of law. A verdict is excessive as a matter of law if shown to exceed 'any rational appraisal or estimate of the damages that could be based upon the evidence before the jury' ") (citations omitted); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1993) (in determining whether the district court abused its discretion in refusing to grant a new trial, on the grounds that damages were excessive, the court of appeals "review[s] the damages evidence in the light most favorable to the jury's verdict, and the verdict must stand unless there is no rational connection between the evidence and the jury's award") (citations omitted).

Moreover, other federal courts of appeals may well have such a standard in mind when they hold that they will reverse the denial of a motion for new trial only in cases where the damages awarded by the jury "shock the conscience" of the court or are "grossly excessive." Gasperini argues that such phrases imply "an improper subjective reevaluation of the facts." Pet. Br. 47. But, as this Court recognized in *Oberg*, "there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia* . . . [i.e.,] *whether 'no rational trier of fact could have' reached the same verdict*[]." 114 S. Ct. at 2341 n.10 (emphasis added). That is a legal question, not a factual one, and the Seventh Amendment does not prevent federal appellate courts from deciding it.

C. Gasperini's Suggested Standard Of Review Is Improper

Gasperini argues that if the Court allows federal courts of appeals to order new trials when damages are excessive, they should be permitted to do so only when "there is a complete absence of evidence to support the size of the verdict." Pet. Br. 49. However, the standard urged by Gasperini is far too restrictive.

It is well established, under this Court's decisions, that even when a party has introduced *some* evidence to support its position, that evidence may be legally insufficient to support a verdict in the party's favor. *See, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986) (on motions for directed verdict, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to make out an issue for the jury; instead, the court should grant judgment as a matter of law to the defendant unless there is "evidence on which the jury could reasonably find for the plaintiff"). *See also Galloway*, 319 U.S. at 395 (when determining whether evidence is legally sufficient to support a jury verdict in a party's favor, the issue is not whether there is "any" evidence, "some" evidence, or "substantial" evidence; rather, "[w]hatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked"). Consequently, when a federal appellate court decides whether a jury could rationally have awarded the amount of damages that it did, the proper inquiry is not whether there was *any* evidence to support the size of the verdict, but rather whether there was *sufficient* evidence to provide rational justification for the size of the verdict.

II. ENGLISH COMMON LAW PRACTICE, AT THE TIME OF THE SEVENTH AMENDMENT'S ADOPTION IN 1791, IS FULLY CONSISTENT WITH THE EXERCISE OF SUCH POWER BY FEDERAL APPELLATE COURTS

Gasperini and his *amici* concede that, under English common law practice prior to 1791, cases were often tried before a single trial judge (the *nisi prius* judge) in the county where the jurors, parties, and witnesses were located, and that the common law trial courts sitting at Westminster, in panels of four judges each, had the power to grant a new trial in such cases on the grounds, among others, that the jury had awarded excessive damages. Pet. Br. 28-30; Brief of Federal Jurisdiction and Legal History Scholars ("Scholars' Br."), at 12-14.[8] Clearly, as Gasperini recognizes, one can analogize the four-judge panel to a modern federal court of appeals and the *nisi prius* judge to a modern federal district court. Pet. Br. 28-29. That means, then, that there is precedent, at English common law, for allowing a federal court of appeals (the analogue of the four-judge trial court at Westminster) to order a new trial on grounds of excessive damages.

However, Gasperini argues against reaching such a conclusion, for two reasons: (1) that "[i]t makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination" (Pet. Br. 30) and (2) that, after the jury had rendered its verdict in a case tried before a *nisi prius* judge, the four-judge panel would grant a new trial, on grounds of excessive damages, only in cases where the

[8] Indeed, only the four-judge panel had the power to grant a new trial; the *nisi prius* judge did not. *See, e.g.*, William Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 53 (1916) ("If the trial was considered unsatisfactory, an application could not be made to the Nisi Prius judge but must be made to the court").

nisi prius judge agreed that a new trial was warranted. *Id.* at 32. However, both of these objections lack merit.

First, federal district courts *do* cease to act as trial courts when they review cases tried in bankruptcy courts and before federal magistrates. Thus, in *Smith v. Strickland*, 178 B.R. 524, 525 (M.D. Fla. 1995), the district court held that "[t]his Court functions *as an appellate court* in reviewing the bankruptcy court's decision . . . ." (Emphasis added). *See also In re Charfoos*, 979 F.2d 390, 392 (6th Cir. 1992) (on appeal from the decision of a bankruptcy court, both the district court and the court of appeals apply the same deferential standard of review); *In re Antweil*, 931 F.2d 689, 691 (10th Cir. 1991) (same), *aff'd sub. nom. Barnhill v. Johnson*, 503 U.S. 393 (1992); *In re United States Trustee*, 32 F.3d 1370, 1372 (9th Cir. 1994) (same). Similarly, when litigants have consented to try their case before a United States magistrate and have elected to appeal that decision to the federal district court, pursuant to 28 U.S.C. §§ 636 (c)(1) and 636(c)(4) (1994), the federal district court "sit[s] as a court of appeals" and "must apply the same rules as a court of appeals." *Jones v. Judy*, 741 F. Supp. 1293, 1294 (N.D. Ohio 1990). Consequently, the district court must apply the same deferential standard of review that a court of appeals does. *Florists Mut. Ins. Co. v. Tatterson*, 802 F. Supp. 1426, 1431 (E.D. Va. 1992) ("[i]n reviewing a decision of a Magistrate Judge, a district court should utilize the same standard of review utilized by the court of appeals in reviewing a decision of the district court"); *Ben v. Burgess*, No. 93 C 4683, 1996 WL 73598, at *2 (N.D. Ill. Feb. 16, 1996) (same); *Forbes v. Weeks Dredging & Contracting, Inc.*, No. CV-93-0111, 1995 WL 669678, at *2 (E.D. N.Y. Nov. 5, 1995) (same).[9]

[9] It is true that when a district judge designates a magistrate to conduct hearings—including evidentiary hearings—on certain kinds of motions, applications, and petitions, the magistrate sub-

Second, even assuming that the four-judge trial court panel at Westminster could not grant a new trial, for excessive damages, against the wishes of the *nisi prius* judge (which is questionable [10]), any such restriction can reasonably be explained by reference to the panel's limited information about the proceedings before the *nisi prius* judge—a procedural difficulty that has been eliminated in modern American practice. Because the Seventh Amendment was intended to preserve only the most fundamental elements of trial by jury, and not those which are attributable to the details of ancient procedure (*Galloway*, 319 U.S. at 390, 392), the Seventh Amendment does not prohibit modern federal appellate courts from granting new trials, for excessive damages, in cases where a federal district court has refused to do so.

As Gasperini and his *amici* acknowledge, the four-judge panel at Westminster had no independent record

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mits findings of fact and recommendations for the disposition of the motion being heard, and the district judge may review *de novo* any portion of that report to which the parties object. 28 U.S.C. § 636(b)(1). However, we are concerned here with matters *tried* to the magistrate (i.e., committed to the magistrate for the handling of all proceedings and the entry of judgment)—the procedure for which is governed by 28 U.S.C. § 636(c), as discussed above.

[10] It appears that excessiveness of damages and verdicts contrary to the weight of the evidence were regarded as two distinct grounds for granting a new trial, and that only the latter required the assent of the *nisi prius* judge. *See* 3 William Blackstone, *Commentaries on the Laws of England* 387 (1768) (listing as separate grounds for granting a new trial [1] "any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith" and [2] that "they [the jury] have given exorbitant damages"); William Forsyth, *History of Trial By Jury* 156-158 (1875) (listing thirteen grounds for granting a new trial, the eleventh being that the verdict was without or contrary to evidence [new trials not usually being granted, where there was conflicting evidence, unless the judge declared himself dissatisfied with the verdict] and the thirteenth being that damages were excessive).

of the evidence presented at trial and had to rely upon the report of the *nisi prius* judge, who had presided at the trial, for that information. *See* Pet. Br. 34 n.32 ("[i]t bears emphasis that the 'record' did *not* include the evidence presented at trial . . . so without the *nisi prius* judge's report, there was no way for the trial court to evaluate whether the verdict was supported by the evidence") (emphasis in original and citation omitted); Scholars' Br. 13 ("The procedure [of moving for a new trial] was informal, being based on the trial judge's information as supplied to his colleagues"). Under those circumstances, it might well have been prudent for the four-judge panel to order a new trial only in cases where the *nisi prius* judge agreed. But modern American appellate courts (the analogue of the four-judge panel at Westminster) have access to a complete and independent record of the evidence given at trial and no longer must rely upon the district judge (the analogue of the *nisi prius* judge) for an account of the trial proceedings. Consequently, in light of modern procedures, it would make little sense to prevent a court of appeals from ordering a new trial just because the district court refused to do so.

This Court held, in *Galloway*, that:

> The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.
>
> * * * *
>
> [T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details . . . .

319 U.S. at 390, 392 (footnotes omitted). To hold that courts of appeals may not grant a new trial, on grounds of excessive damages, just because the district court failed

to do so, would pay undue homage to the "mass of procedural forms and details" that existed in 1791. The "fundamental elements" of jury trial, as it existed at the common law, are not compromised by permitting appellate courts to grant new trials on the grounds of excessive damages.

III. IN THIS CASE, THE COURT OF APPEALS FOUND THAT THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO AWARD DAMAGES IN THE AMOUNT THAT THE JURY DID, AND THEREFORE THE COURT DID NOT VIOLATE THE SEVENTH AMENDMENT BY REVERSING THE DISTRICT COURT'S DECISION TO DENY A NEW TRIAL

Although the court of appeals in this case did not articulate its standard of review as clearly as it might have, it is sufficiently clear, from the language used in the opinion, that the court reviewed the district court's denial of the Center's motion for new trial under the appropriate standard: namely, whether, making all reasonable inferences in favor of Gasperini, reasonable persons could not, in light of the evidence, have awarded the amount of damages that the jury did. Consequently, the court of appeals' decision to offer Gasperini a choice between remittitur or a new trial did not violate the Seventh Amendment.

The court of appeals held that "it is not our job to impose a specific award of damages—that task is for the jury. We do, however, have the obligation to patrol the outer bounds of what damages a jury may *reasonably* award, and to offer a choice between remittitur and new trial when those bounds have been exceeded." Pet. App. 9a (emphasis added and citations omitted). Accordingly, the court made clear that it was "[d]rawing all reasonable inferences in favor of Gasperini" and "[g]iving Gasperini every benefit of the doubt" (*id.*), but that, even so, "Gasperini failed to make a showing" that, under New York damages law, would be "sufficient to sustain the jury's verdict." Pet. App. 5a. The court of appeals also held that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." *Id.* These statements indicate that the court of appeals confined itself to determining whether a rational trier of fact could have made the award that the jury did.

Gasperini suggests that because the court of appeals announced that it was applying New York's "reasonable compensation" standard (i.e., "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation"), and because New York's intermediate appellate courts may make *de novo* findings of fact in applying that substantive standard, the court of appeals assumed that it, too, could undertake *de novo* review of the jury's award. Pet. Br. 8. However, as demonstrated above, the court of appeals did not undertake the kind of *de novo* review that New York intermediate appellate courts perform and thus implicitly declined to follow New York's procedure for appellate review of damages awards. Rather, it used a standard of review that fully complies with any limitations imposed by the Seventh Amendment: namely, whether, making all reasonable inferences in favor of the plaintiff, reasonable persons could not, in light of the evidence, have arrived at the verdict that the jury did.[11]

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[11] The court of appeals stated that the standard of review that it employed "accords less deference to the jury's award" than does the "traditional" shock-the-conscience standard. Pet. App. 8a. For the reasons discussed in Part I.B of the Argument above, the *amici* doubt whether that is correct; the two standards are in all likelihood identical. But even if the court of appeals was correct, and the shock-the-conscience standard is more deferential to the jury's verdict than the standard that the court of appeals actually employed, the fact that the latter standard complies with the

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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March 1996

Seventh Amendment means that the shock-the-conscience standard, being even *more* deferential to the jury, certainly must comply with the Seventh Amendment.

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INTEREST OF AMICUS CURIAE[1]

The Product Liability Advisory Counsel, Inc. ("PLAC") is a nonprofit corporation with 114 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to machinery, pharmaceutical products, and medical devices, as well as other consumer products.[2] PLAC's purpose is to file *amicus curiae* briefs on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

PLAC member corporations frequently are sued for personal injury or property damage and are victims of damage awards which are grossly excessive. Its members are fully familiar with the deleterious effects of such awards if left unfettered by the full panoply of available safeguards, including the right of appellate review. Excessive verdicts harm not only individual defendants, but society as a whole. Excessive verdicts, if permitted to stand, lead to an upward spiral of verdicts resulting in ever larger damage awards. The need to provide coverage for such excessive awards has led to a real crisis in the insurance industry, with fewer and fewer insurance companies willing to continue to provide liability coverage. In turn, inability to obtain such insurance has caused many companies to curtail their activities, or to go out of business entirely. Petitioner's and his *amici's* suggestion that appellate review of excessive verdicts be eliminated in its entirety, if accepted, would aggravate an already dangerous situation. Accordingly, *amicus* has a strong interest in assisting this Court to determine the scope of appellate review of excessive federal jury verdicts.

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1. The parties' written consent to the submission of this brief is on file with the Court.

2. PLAC is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Act of 1982. PLAC members are listed in the Appendix.

SUMMARY OF ARGUMENT

Distilled to its essence, petitioner's argument and that of his *amici* is that the Seventh Amendment bars appellate review of a federal jury's damage award for excessiveness and proscribes issuance of appropriate relief. Thus, for example, if a district court jury in a routine diversity "slip and fall" personal injury case awarded plaintiff $100 million for a broken ankle and the trial court denied post-trial relief, the circuit court of appeals, constitutionally speaking, purportedly is paralyzed from finding such award excessive and remitting the amount conditional on a new trial. Petitioner and his "legal history scholars" *amici* gussy up this bizarre proposition with confusing historical references to English common law and artful characterizations of what the Second Circuit decided in *Gasperini*. The result is a legal burlesque.

Why the trial lawyer *amici* wish to shield from appellate review those "runaway" verdicts awarded by inflamed juries is understandable. Hefty contingent fees that follow such awards may well be inspirational. But no amount of inspired verbal sleight of hand justifies the tortured remolding of the Second Circuit's decision, the distortion of fundamentals of English common law, and the artificial attempt to elevate ancient procedural form over substance.

Appellate review of jury verdicts sustained at the trial level - tempered by appropriate appellate deference to the jury's factfinding role and trial court discretion - is a long-standing universal practice. Before this well-accepted and balanced regime may be displaced, petitioner must discharge a heavy burden of proof. That burden simply has not been met. First, this case does not present the legal issue petitioner and his *amici* say it does. The Second Circuit panel did *not* reweigh the evidence nor substitute its finding for that of the jury. A false issue has been presented. We explain below why this Court ought not to grant the relief sought in this case.

Second, the English common law at all relevant times did permit appellate review "above" the trial court level - both a true appellate forum as we know it as well as a form of review that functionally can be classified as "appellate." Moreover, petitioner and his *amici* focus only on ancient procedural forms and titles, not on substance and function. Many procedures in ancient England differed

from ours today. The Seventh Amendment neither intended to nor does confine us to eighteenth century English forms.

Third, the attempt to eradicate normal circuit court remittitur practice via the arguments presented here reflects a misapprehension of what a conditional remittitur really is. In turn, this confirms petitioner's misunderstanding of what the Second Circuit actually did in *Gasperini* and why the well-accepted remittitur practice does not implicate the Seventh Amendment. The truth is that allowing excessive jury tort awards violates essential public policies. Tort law is meant to compensate the losses incurred by those who are injured; to allocate and spread the risk and costs of injuries; and to deter similar tortious misconduct. None of these vital policies are served when excessive awards are shielded and relief not granted. There has been no showing whatsoever that English common law favored permitting excessive verdicts to stand. On the contrary, Blackstone's Commentaries and other sources, as we show below, reveal that exorbitant awards were abhorred. To say that the Seventh Amendment forbids the appellate review and relief in this case is to turn original intent on its head. Petitioner and his trial lawyer *amici*, in effect, argue for imposition of a new tyranny - untouchable sanctity for "runaway" jury verdicts. The Seventh Amendment is not an apt vehicle for creating such new tyrannies.

POINT I

THE SECOND CIRCUIT DECISION IN *GASPERINI* DOES NOT INVOLVE A REEXAMINATION OF FACTS AND DOES NOT IMPLICATE THE SEVENTH AMENDMENT.

The circuit court's decision in *Gasperini v. The Center For The Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), can be divided into two parts, neither of which violates the Seventh Amendment.[3] Thus,

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3. It is questionable whether a constitutional issue truly is presented here, where defendant conceded liability and the only issue presented is one of damages. *Tull v. United States*, 481 U.S. 412, 426 f.n. 9 (1987) ("We have been presented with no evidence that the framers meant to extend the right to a jury to the remedy phase of a civil trial."). Indeed, in an analogous situation, where a defendant has defaulted on the issue of liability, the right to a jury trial on damages has often been questioned. *See,*

(continued...)

while petitioner and *amici* devote inordinate space to the issue whether a federal appellate court can engage in "weight of the evidence" review of a judgment entered pursuant to a jury verdict, that simply is not what happened here. The Second Circuit's order of a new trial was not premised on the "weight of the evidence" but rather on the "insufficiency of the evidence", a recognized legal, not factual, standard. That determination warranted setting aside the jury's verdict and granting a new trial. The second phase of the decision ascertained the amount of damages that could be sustained by the evidence so as to give plaintiff the option of accepting the lower amount rather than burdening the parties and the district court with a new trial. This aspect of the decision, purely optional and not taking from plaintiff a right to trial by jury, likewise does not implicate the Seventh Amendment.

A. *The Finding of Insufficient Evidence*

At issue in *Gasperini* was the proper valuation of photographic transparencies loaned to defendant and admittedly lost. At trial, the jury awarded plaintiff $450,000 in damages, finding that each of the 300 lost transparencies was worth $1500. Defendant's Rule 59 motion for a new trial was denied. On appeal, the Second Circuit, after determining that "New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer," determined that "Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict." 66 F.3d at 429. Unquestionably, this aspect of the circuit court's decision involved pure issues of law. A determination of what elements must be proven as well as a determination of insufficiency of the evidence are all findings of law.

Petitioner's attempt to categorize these determinations as a weighing of the evidence or as a finding of fact are clearly belied by the

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(...continued)

e.g., *Goldman, Antonetti, et. al. v. Medfit International, Inc.*, 982 F.2d 686, 692 (1st Cir. 1993); *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

decision itself. Contrary to petitioner's claim (Pet. Br. at 8), the circuit court did not ignore or discount any evidence which had been presented. Rather, it noted that the expert failed to address the elements which must be proven under New York law and focused instead on a purported "industry standard". Describing the testimony of petitioner's expert as being "of little utility", 66 F.3d at 429, the court observed that "[h]er explanation for this valuation, however, said a lot about the alleged industry standard and virtually nothing about either uniqueness or earning level." The circuit court's conclusion that there was insufficient evidence to sustain the jury verdict, is a determination of law. Consistent with the common law, circuit courts have the power to set aside a jury verdict based on the insufficiency of the evidence and to order a new trial. *See Slocum v. New York Life Insurance Company*, 228 U.S. 364, 400 (1913). In this regard, the Second Circuit specifically found that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly original." 66 F.3d at 429.

After noting that the object of tort damages is to make plaintiff whole and not "to be a winning lottery ticket", the circuit court concluded:

> "In light of Gasperini's failure to make an effective showing that all 300 lost transparencies were unique, and the strong evidence of Gasperini's limited earning power as a photographer, the jury's award of $450,000 cannot be regarded as anything but a financial windfall for Gasperini." *Id.*

The court of appeals' finding of insufficient evidence furnished ample legal ground to set aside the jury verdict and remand for a new trial. Accordingly, that portion of the determination is certainly not subject to constitutional challenge.

B. *The Remittitur Conditioned on a New Trial*

The second phase of the circuit court determination is one by which plaintiff is not aggrieved and which is equally free of constitutional infirmity. Having determined that the jury verdict could not be sustained for legally insufficient proof the court then reviewed the evidence to determine how much, if any, of the jury verdict could be

sustained. The purpose of this exercise, a common practice in state and federal courts, was to avoid the need to burden the parties and the district court with a new trial.

"Giving Gasperini every benefit of the doubt" and "drawing all inferences in favor of Gasperini" the court concluded that the jury's award of $450,000 "materially deviates from what is reasonable compensation." 66 F.3d at 431. The Second Circuit then found that there may have been as many as 50 transparencies as to which "there was plausible evidence of significant uniqueness" and for which the jury could have awarded Gasperini $1500 per transparency. As to the remaining items the court determined that, in light of Gasperini's limited earnings as a photographer and the lack of uniqueness, any award of more than $100 per transparency could not be sustained by the evidence.

This evaluation of the evidence was not an "against the weight of the evidence" analysis. Rather, it was a sufficiency of the evidence analysis. Thus, any evaluation of evidence in which the court gives a party the benefit of every doubt and draws all inferences in favor of that party implies a determination of evidentiary sufficiency. The court's exercise was a determination of law, not fact. And it was made in pursuit of the conditional remittitur mechanism, a device with roots in common law that frequently obviates a retrial. The circuit court then gave plaintiff the option of accepting this reduced amount, or proceeding with a new trial. Until this point, the jury award of $450,000 clearly had to be vacated as a matter of law. The award could not stand. A new trial inevitably would be required. The remittitur aspect of the circuit court's decision thus merely established an amount that could be sustained at plaintiff's option. At all times, petitioner's fundamental right to a jury trial was preserved and, therefore, no clash with Seventh Amendment rights occurred. As framed by petitioner, this proceeding presents a false issue since it plainly does not involve an appellate court's review of evidential weight at all.

POINT II

THE SEVENTH AMENDMENT DOES NOT BAR APPELLATE REVIEW OF JURY VERDICTS ON EXCESSIVENESS GROUNDS.

A review of the history of the Seventh Amendment and the cases which have applied it clearly shows that the Amendment does not preclude federal appellate review of jury verdicts for excessiveness. Contrary to petitioner's assertions, when an appellate court is asked to determine if a jury award is excessive, it is not making a *de novo* factual determination, nor is it making its determination based on the weight of the evidence. Accordingly, petitioner's and *amici's* lengthy discussions as to whether or not the Seventh Amendment permits federal appellate courts to engage in *de novo* or "weight of the evidence" review of any fact found by a jury are misleading and really beside the point. While we submit that federal appellate courts do in fact have the power to review facts, the only issue presented here is whether the Seventh Amendment precludes federal appellate review of a trial court's refusal to grant a new trial due to the excessiveness of the jury's verdict. As to that issue the answer must be in the negative.

A. *Excessiveness Review Involves An Issue of Law, Not Fact*

Every federal circuit court has held that appellate review of jury verdicts on the grounds of excessiveness is permissible. *See, e.g. Dagnello v. Long Island Railroad Company*, 289 F.2d 797, 802 (2d Cir. 1961) (citing cases from each circuit). Implicit in these decisions is recognition that appellate review of a trial court's denial of a new trial due to excessiveness of a verdict does not involve a "reexamination of facts". Rather, it presents an issue of law.

Logic confirms the practice. Thus, when an appellate court reviews a damage award to determine whether it comports with an applicable legal standard, it is deciding an issue of law. For example, if New York had a statute which required that a court review a damage award to insure it did not materially deviate from reasonable compensation, and the statute proceeded to list dollar amounts pursuant to a schedule, such as $100,000 for a broken leg, $200,000 for a hip injury or $500,000 for a head injury, whether the trial court correctly applied such statutory guidelines would clearly present an issue of law

on appeal. 6A Moore's, Federal Practice, ¶59.08[6], pp. 59-169; *see, Southern Railway Carolina Division v. Bennett*, 233 U.S. 80, 87 (1914). The fact that the New York statute defining the standard of review does not set forth dollar amounts but allows appellate courts to determine them by reference to awards sustained in other cases, New York Civil Practice Law and Rules 5501(c), does not change the legal issue into one involving a "reexamination of facts". *See, Erie R.R. Co. v.Tompkins*, 304 U.S. 64, 78 (1938) ("And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern.") In undertaking this analysis, the appellate court is not making new findings of fact; rather it is applying to the facts as found by the jury the legally permissible standard of reasonable compensation allowed by state law.

Moreover, if, as petitioner concedes (Pet. Br. at 38), a trial court may set aside a jury verdict as excessive, order a remittitur conditioned on a new trial then certainly the circuit court, consistent with the Seventh Amendment, can determine whether the district court abused its discretion. It is settled that review of a determination by a district court under an abuse of discretion standard presents a question of law. Whether defined as "a definite and firm conviction that the trial court committed a clear error of judgment," *Logan v. Dayton Hudson Corporation*, 865 F.2d 789, 790 (6th Cir. 1989); or "an 'absolute absence of evidence to support the jury's verdict,'" *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991); or "(1) the court's decision is 'clearly unreasonable, arbitrary or fanciful'; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the district court rationally could have based its decision," *Heat and Control Inc. v. Hester Industries Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986), the standards for reviewing an abuse of discretion clearly present an issue of law, not fact. Here, the Second Circuit's determination that the damage award was not supported by the evidence, and that the trial court therefore abused its discretion in failing to order a new trial, was a determination of a legal issue. Such a ruling plainly is consonant with the Seventh Amendment.

B. *The Common Law Clearly Permitted Appellate Review For Excessiveness*

In addition to guaranteeing the right of jury trials in civil cases, the Seventh Amendment bars the "reexamination" of facts found by a jury other than as under the rules of the common law. That provision does not preclude appellate review of excessive verdicts. Thus, it was a well-accepted practice under the common law for appellate courts to order a new trial when the jury had rendered an excessive verdict. Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 53 (1916). According to Professor Fleming James, Jr., "[t]he practice of granting new trials because the verdict is excessive was well established at common law when our constitutions were adopted." James, *Remedies For Excessiveness or Inadequacy of Verdicts*, 1 Duq. L.R. 143 (1964).[4]

Judge Edwin Holmes, in his scholarly dissenting opinion in *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475, 477-484 (5th Cir.), *cert. denied*, 342 U.S. 828 (1931),[5] elaborated the historical right of a circuit court of appeals to set aside a jury verdict on grounds of excessiveness, and to order a new trial. While, as this Court noted in *Honda Motor Co. v. Oberg*, 512 U.S. ____, 129 L.Ed.2d 336, 344 (1994), there are few reported cases available from the eighteenth century, Judge Holmes, based on his intensive and systematic review of the classic commentators on English common law, concluded that common law appellate courts had power and authority to review excessive jury verdicts and to order new trials as relief. According to Judge Holmes, "the contention that procedure by remittitur in federal appellate courts is inhibited by the Seventh Amendment is contrary to the teachings of

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4. According to Professor James this differed from additur since "the practice of granting new trials because of inadequacy was not well settled in England at this time." James, *op. cit.*, at 145. This provides the simple explanation for why remittitur is permitted and additur is not.

5. Judge Holmes' dissenting opinion has been cited with approval by various circuit courts, including the Second Circuit in *Dagnello v. Long Island Rail Road Co.*, *supra*, 289 F.2d at 804, and the Seventh Circuit in *Bucher v. Krause*, 200 F.2d 575, 587 (7th Cir. 1953)

Ashton, Bracton, Fleta, Glynn, Coke, Mansfield, and Blackstone, as to the rules of the common law of England." 187 F.2d at 480. In addition, Judge Holmes cited the case of *Ducker v. Wood*, 1 Term Reports 277 (K.B. 1786), where Lord Mansfield held that there was no doubt but that the court had the power to take the opinion of a second jury where the damages awarded by the first jury were excessive. 187 F.2d at 479, 483.

Judge Holmes cites both Blackstone and Bracton for the proposition that, while the responsibility to review a jury verdict lies initially with the trial court, where the latter fails to fulfill its responsibility the task can be undertaken by a higher court. Thus, in olden times, although the motion for a new trial preceded entry of judgment,

> "[n]ot only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this 'or could not decide it,' as Bracton said, 'it was referred to a higher tribunal.'" 187 F.2d at 479.

The procedure of referring the issue of excessive damages to a higher tribunal was one of the things that Blackstone said "rendered perfect the most excellent method of decision which was the glory of the English law." Blackstone's Comm., Vol. III, p. 391.

Indeed, in *Honda Motor Co. v. Oberg, supra*, this Court recognized that early English cases "steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high". 129 L.Ed 2d at 343.[6] Thus, appellate review of excessive damage awards is premised on a long history dating back to the English

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6. It is clear from a review of the cases cited by this Court in *Honda, supra*, that the determination whether or not to grant a new trial on the grounds of excessiveness was not decided by the trial judge. Rather, the determination was made by a group of judges who made their decision after reviewing the evidence and, in certain cases, after comparing the awards in these cases to the awards in other cases for similar injuries, the very standard now in effect in New York to which petitioner so strenuously objects. See, *e.g.*, *Goldsmith v. Lord Sefton*, 3 ANST. 808, 145 Eng Rep. 1046 (Exch 1796).

common law. Such review is certainly permitted where the appellate court does not direct entry of judgment but rather remands the matter for a new trial.

C. *The Practice of Conditional Remittitur is Constitutionally Sound*

The remittitur aspect of the *Gasperini* decision is equally unobjectionable. In the second part of its decision the circuit court determined the maximum award of damages that could be sustained by the evidence when viewed in the light most favorable to plaintiff. The court's finding amounts to a recommendation intended to avoid burdening the district court and the litigants with a new trial. Because the Second Circuit already had determined that the verdict could not be sustained, plaintiff was in any event faced with the prospect of a new trial. The court's grant of a conditional remittitur, which left the option of a new trial open, deprived plaintiff of nothing. If plaintiff deemed the amount proposed by the court to be unfair, he could proceed with the new trial. It also did not violate the defendant's constitutional right to a jury trial. See *Northern Pacific Railroad Co. v. Herbert*, 116 U.S. 642 (1885); *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69, 32 L.Ed. 854, 856 (1889) (authority of Court to determine which damages excessive implies authority to determine when they are not). The universally accepted practice of permitting federal appellate courts to review verdicts for excessiveness and to order remittiturs conditioned on new trials is one which does not present an issue of fact and which therefore does not at all implicate the Seventh Amendment.

POINT III

ENGLISH COMMON LAW TOLERATED APPELLATE REVIEW OF FACTS. THE LIMITED SCOPE OF REVIEW BY U.S. FEDERAL APPELLATE COURTS STEMMED FROM THE JUDICIARY ACT, NOT THE SEVENTH AMENDMENT.

Even if the circuit court's review of the verdict and of the district court's refusal to grant a new trial were characterized as a review of the factual findings of a jury, and even if a circuit court's issuance of a remittitur were characterized as a finding that the verdict was unsupported by evidence, the Seventh Amendment is not offended.

The Amendment expressly excepts such reexamination of a jury's factual findings when "the rules of the common law" allow. As we will show, common law courts substantively equivalent to our circuit courts had the power, precisely, to review jury damage awards to determine whether the amount awarded was excessive and against the weight of the evidence. The Seventh Amendment provides no ground to more severely hamstring our circuit courts.

A. *The History of the Seventh Amendment*

Article Three of the Constitution vested judicial power "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Pursuant to Article 3, Section 2, Clause 2, the Supreme Court was given "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." While Article 3 guaranteed a right to trial by jury in criminal cases it did not guarantee a similar right in civil cases.

Shortly after adoption of the Constitution, Congress enacted the Judiciary Act of 1789, creating a system of courts consisting of district courts with original jurisdiction, circuit courts with original and appellate jurisdiction, and the Supreme Court with original and appellate jurisdiction. Judiciary Act, Sec. 1, Sec. 3, and Sec. 4. The Judiciary Act did not provide for the appointment of circuit court judges. Rather, the circuit court consisted of two Supreme Court Justices who were assigned to ride circuit, and a district court judge from within the circuit. Judiciary Act, Sec. 4. The Judiciary Act, Section 17, provided that:

> "*all* said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law." Emphasis added.

In addition, the Judiciary Act delineated the appellate power of the Federal Courts to be limited to a writ of error and further provided as follows:

> "But there shall be no reversal in either [supreme or circuit] court on such writ of error for error in ruling any plea in abatement, other than a plea to the

> jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact." Judiciary Act, Sec. 22.

By limiting the scope of appellate review to the writ of error, Congress essentially authorized this Court and the circuit court to review only issues of law, not issues of fact. That authority was broadened by the Eavarts Act of 1891, which expanded the scope of the circuit court's appellate review to include appeals, and once again in 1948, when the language precluding appellate review of facts was omitted from 28 U.S.C. §2105 and §2106. Apparently constrained by the long practice which had developed when the Judiciary Act of 1789 was in effect, modern day circuit courts have not taken full advantage of the expanded scope of review which is now statutorily permitted.

Almost simultaneously with enactment of the original Judiciary Act, Congress proposed the Seventh Amendment to the state legislatures for ratification. In addition to preserving the right to jury trial in all suits at common law, the Seventh Amendment provided:

> "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Thus, unlike the near-contemporaneous Judiciary Act, the Seventh Amendment did not preclude appellate review of facts in their entirety. Instead, it grafted the rules of the common law onto the federal judicial system.

B. *The Scope of the Seventh Amendment*

Any discussion of the meaning and intent of the Seventh Amendment was quickly laid to rest by Justice Story in his decision in *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433 (1824). Without engaging in any discussion of the issue and without citing any authority, Justice Story described the powers of the courts under the common law "to reexamine facts" tried by a jury, as follows:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a

venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

Despite the Judiciary Act's preclusion of appellate review for errors of fact, thereby making a determination of the Seventh Amendment's scope unnecessary to a resolution of the issue then before the Court, all subsequent cases dealing with the constitutional issue simply picked up Justice Story's language quoted above and held it dispositive of the Seventh Amendment scope of review question. In fact, in *Fairmount Glass Works v.Cub Fork Coal Co.*, 287 U.S. 474, 481-482 (1933), this Court recognized that "the rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact" is premised on the Judiciary Act of 1789, and only sometimes premised on the Seventh Amendment. We respectfully submit that decisions addressing the scope of the Seventh Amendment which predate the amendment of the Judiciary Law in 1948, 28 U.S.C. 2105, must be treated as non-binding *dicta*, since, until that time, any appellate review of facts was in any event foreclosed by the provisions of the Judiciary Act of 1789.[7] Accordingly, there was neither need nor interest for the courts in those cases to reach the constitutional issue or probe the accuracy of Justice Story's observation about common law practice insofar as it applied to appellate review. In fact, there is reason to question the accuracy or breadth of that statement.

C. *The Scope of Appellate Review Under English Common Law*

We respectfully submit that Justice Story did not portray trial and appellate practice under the English common law in its entirety. Accordingly, to the extent that this Court's earlier decisions relied on *Parsons v. Bedford, supra*, they should not be viewed as dispositive of the issues here.

A review of English common law as it existed in 1791, when the Seventh Amendment was adopted, reveals that there was available a form of appellate review of jury verdicts. The judicial system as it

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7. While the Eavarts Act expanded the scope of review to include appeals as well as writs of error, the Judiciary Act still barred review for error of fact.

existed at the common law included the Court of Common Pleas, the Exchequer, and the King's Bench. See, generally, Blackstone, Comm., Vol. III, Chapter IV. The Court of King's Bench had both original and appellate jurisdiction, and had appellate authority to review determinations made at the Court of Common Pleas, and all inferior courts. Blackstone, Comm., Vol. III, pp. 42-43. A party who was dissatisfied with the determination by the King's Bench could appeal to the House of Lords. *Id.* According to Blackstone, the King's Bench was presided over by one or more judges, who sat together in courts that were mutually connected and were interchangeably courts of appeal or advice to each other. Blackstone, Comm., Vol. III, p.356.

Under the English common law, all of the courts were based at Westminster. For the convenience of the parties, witnesses and jurors, the *Nisi Prius* system was created pursuant to which judges of the various courts were assigned to travel and preside over jury trials throughout the country. These *Nisi Prius* judges served by commission and were only authorized to try the issues to be resolved, and to report the results reached by the jury. Riddell, *New Trial at the Common Law, supra*, 26 Yale L. J., at 49, 52. A party dissatisfied with the outcome of the trial could move for a new trial. That motion was presented to an *en banc* panel of judges sitting at Westminster who would review the evidence and determine whether or not a new trial should be granted. *Id.*

Blackstone's Commentaries describes this procedure as follows:

> "Next follows, *sixthly*, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be *suspended*, or finally *arrested*: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, *the party may have relief in the court above*, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not

made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

"1. Causes of *suspending* the judgment, by granting a *new trial*, are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified by the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*.

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"*The exertion of these superintendent powers of the king's courts*, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances, in the year-books of the reigns of Edward III., Henry IV., and Henry VII., of judgments being stayed (even after a trial at bar) and new *venire's* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal species of misbehavior." Blackstone's, Comm., Vol. III, pp. 386-387; Emphasis added.

Petitioner insists that this procedure sets forth the model for judicial review of jury verdicts which must be followed in order to comply with the Seventh Amendment, and points to this system in support of his position that only the trial judge at common law is permitted to set aside a verdict as against the weight of the evidence.

This argument is unsupported by the historical evidence upon which it relies. The system described is in actuality more akin to an appellate review than it is to a system where the determination to set aside a verdict is made by the trial judge. Thus, there is no question that the judges who decided the motion for a new trial had not presided over the original trial and had not heard the evidence directly. Indeed, according to the preceding quote from Blackstone, this entire application was made *"in the Court above"*. See also, Pound, *Principles of Practice Reform*, 71 Cent. L.J. 221, 228 (1910), reprinted in Comment, *Federal Review of Excessive Verdicts*, 30 Texas L. Rev. 242, 245 (1951). The mere fact that the judges "in the Court above" had both original and appellate jurisdiction does not change the fact that it was *not* the trial judge reviewing the evidence and making the ultimate determination. Riddell, *op. cit.*, 26 Yale L.J. at 56. In fact, our circuit courts were clearly designed to incorporate the powers of the English court sitting *en banc* to review jury verdicts. Daniel Webster described the circuit courts as follows:

> "The Courts, indeed were called Circuit Courts; which seemed to imply an itinerant character, but, in truth, they resembled much more, in their power and jurisdiction, the English Courts sitting in bench, than the Assizes, to which they have been likened." 2 Cong. Deb. 873-74 (1826), reprinted in Comment, *Federal Review of Excessive Verdicts, supra*, 30 Texas L. Rev., at 244.

Petitioner makes much of the fact that the motion for a new trial had to be certified to the *en banc* panel and argued by the *Nisi Prius* judge. This argument, too, is without foundation. While this may have been the practice in the Court of Common Pleas, it never became the accepted practice in the King's Bench, as Blackstone makes clear. Indeed, at King's Bench the motion was decided on the basis of the *postea*, the predecessor to our Record on Appeal or Appendix. The

description of the procedure by which a new trial was obtained, included in Blackstone's Commentaries, directly contradicts petitioner's arguments:

> "A few years before, a practice took rise in the common pleas, of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence), that the verdict had passed against his opinion; though chief justice Rolle (who allowed of new trials in case of misbehavior, surprise, or fraud, or if the verdict was notoriously contrary to evidence) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon affidavits; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." Blackstone's Comm., Vol. III, p. 388.

Moreover, even assuming that petitioner's argument were factually correct, it still would not be dispositive of the issue presented here. Rather, it appears that the "information" which had to be certified by the trial judge was merely a function of the fact that at that time trial records were not transcribed, and the trial judge was the only person who could dispassionately present the facts of the case to "the Court above". Thus, according to Blackstone's Commentaries, a motion for a new trial would only be granted where sufficient ground to warrant a new trial was presented by the parties.

> "A sufficient ground must however be laid before the court, to satisfy them that it is necessary to justice that

> the cause should be farther considered. If the matter be such, as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled." Blackstone's Comm., Vol. III, pp. 391-392.

The right to have a new trial granted by "the Court above" was viewed as a desirable aspect of the right of *appeal:*

> "If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing: which might be reviewed in a course of appeal. Blackstone's Comm., Vol. III, p. 390.

Moreover, the procedure which permitted "the Court above" to grant a new trial was viewed as a means of insuring a fair determination without impinging in any way on the right to trial by jury. Thus, contrary to petitioner's gloss, the policy of the common law was to enhance the right of trial by jury by insuring that jury verdicts were in fact reviewable.

> "Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one

> side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case." Blackstone's, Comm., Vol. III, p. 391.

Indeed, we submit that when Congress included a prohibition on the "reexamination of facts" in the Seventh Amendment other than as according to the rules of the common law, it sought to prevent a court from resolving as opposed to reviewing, issues of fact. Congress did not intend to preclude the mere grant of a new trial following a review of the factual record. This is evidenced by the provision in Section 4 of the Judiciary Ac, of 1789, granting "*all* courts of the United States" power to grant new trials.

D. *The Seventh Amendment Was Intended To Preserve Fundamental Rights, Not Antiquated Procedures*

Petitioner's effort to limit the review of jury verdicts to precisely the archaic form of review that existed under English common law is untenable, given the differences between today's federal practice as opposed to that followed by courts in 1700's England. Petitioner's method of circumscribing the scope of review of jury verdicts by resort to the structural forms effective in 1700's England, if accepted, would bring the federal judicial system as we know it to a grinding halt. Taken to their logical conclusion, petitioner's and his *amici's* arguments would force a return to ancient judicial review practices in fear that some aspect of the review authorized today was not available then and, therefore, "reexamines a fact found by a jury other than according to the rules of the common law." Such a suggestion truly elevates form over substance.

That this was not the Seventh Amendment's intent is evidenced by contemporaneous events. The federal judicial system created by the same congress which adopted the Seventh Amendment, though similar,

did not mirror the English judicial system. The federal scheme incorporated many significant differences including the simultaneous functioning of state and federal courts, and creation of a unified and interconnected court system which could exercise both equitable and legal jurisdiction simultaneously. English procedures were not immutable fixtures in federal court practice.

Moreover, petitioner's form-over-substance reading of the Seventh Amendment would render every district court jury verdict completely immune from judicial review, for neither our district courts nor our circuit courts precisely mimic the *en banc* panel which performed that function in ancient England. Rather than buttress rights to a jury trial, however, petitioner's approach would undermine one of the key safeguards engrafted onto and incorporated within the right to a jury trial as it existed at English common law, i.e., a review for a new trial by "the Court above". The point was recognized by this Court in *Capital Traction Co. v. Hof*, 174 U.S. 1, a15 (1898), when it said that court's "direction and superintendence was an essential part of the trial," and "[a]t the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict."

Plainly, some review of what went on at trial is required. As highlighted by the contemporaneous differences between the American and English judicial systems, there is no question but that the adopters of the Seventh Amendment could not have intended to impose the precise English practices of the 1700's as a rigid, unchanging model which, for generations to come, would be used to delineate the scope of judicial review of a jury verdict. See *Galloway v. United States*, 319 U.S. 372, 390-391 (1943) "Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791", the passage of time obscured much of the[earlier] procedure.

The confusion regarding the exact scope of permissible appellate review of jury verdicts is a perfect example of a procedure which has become clouded. However, even though the precise procedures may have become obscured, the essential fact that jury verdicts could in fact be reviewed and set aside by "a Court above", composed of judges who had not presided over the trial and who had

not themselves heard the evidence, is clear. Whether or not that panel was an appellate court, *per se*, and in exact form akin to our appellate tribunals, should not dictate whether or not appellate courts now in place are permitted to review jury verdicts. See *Dimick v. Schiedt*, 293 U.S. 474, 490 (1935) (dissenting opinion) (Seventh Amendment not intended "to perpetuate in changeless form the minutiae of trial practice.")

This very point was recognized by this Court earlier in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1930). There this Court, in upholding the right to a partial retrial, a practice which did not exist at the common law, recognized that "the constitution is concerned, not with form, but with substance. . . . Beyond this, the Seventh Amendment does not exact the retention of old form of procedure".

Indeed, with regard to the first clause of the Seventh Amendment, this Court repeatedly has recognized that the Amendment was not intended to carry over every feature of a jury trial that existed at the common law. See, *Colgrove v. Battin*, 413 U.S. 149, 157-158 (1973) (jury of six satisfies requirements of Seventh Amendment); *cf. Williams v. Florida*, 399 U.S. 78, 92-93 (1970) (jury of six satisfies requirements of Article 3). See *also, Tull v. United States, supra*, 481 U.S. 412, 426, where this Court once again noted that the Seventh Amendment was only intended to preserve the basic aspect of a trial by jury, holding that "only those incidents which are regarded as fundamental, as inherent in and of the system of trial by jury, are placed beyond the reach of the legislature."

Thus, Congress is unencumbered by the Seventh Amendment and is free to determine exactly which court and under precisely which procedures and mechanisms verdicts can be reviewed.

In the Judiciary Act of 1789, circuit courts had both original and appellate jurisdiction; the appellate jurisdiction of the circuit courts was limited to writs of error, and they were precluded from reviewing issues of fact. In 1891, in response to this Court's burgeoning case load, the federal circuit courts as we know them, i.e., with only appellate jurisdiction, were created. Laws of 1891, Ch. 517.

At that time the scope of circuit court review was broadened to include "appeals" as well as writs of error. *Id.*, Sec. 6. This clearly

expanded the appellate authority which had been given to circuit courts in 1789. Thus, as this Court recognized in *Capital Traction Co. v. Hof, supra*, 174 U.S. at 37, "[i]n all acts of Congress regulating judicial proceedings, the very word 'appeal' unless restricted by the context, indicates that *the facts, as well as the law*, involved in the judgment below *may be reviewed in the appellate court*." (Emphasis Added). That Congress intended to expand the very scope of circuit court appellate review also is underscored by the fact that, in the 1948 amendment of the judiciary code, the language in the Judiciary Act of 1789 which had limited the jurisdiction of the circuit courts solely to issues of law, was omitted. 28 U.S.C. §2105 and §2106. Accordingly, the Judiciary Act can no longer be viewed as a bar to a review of facts by the circuit courts. Case Note, *Federal Courts' Review by Courts of Appeals*, 65 Harvard L.R., 1064, 1065 (1952); Comment, *Federal Appellate Review of Excessive or Inadequate Damage Awards*, 28 Fordham L.R. 500, 502 (1959). That circuit courts have not exercised their full statutory mandate, whether due to historical inhibition, force of earlier dicta or self-restraint is beside the point. Some factual review is statutorily available.

The foregoing makes clear (a) that the Seventh Amendment intended to permit judicial review of jury trials to the extent substantively permitted at common law, without regard to the exactitude of procedural conformity to ancient English practices; (b) that under English common law, judicial review of facts for the purpose of determining whether or not to direct a new trial *was* authorized to be undertaken by "the Court above", whether or not that court was precisely the equal of our circuit courts; and (c) that Congress' expansion of the role of circuit courts to permit review of facts in order to determine whether a new trial is appropriate is entirely consonant with the English common law and, hence, fully consistent with the Seventh Amendment.

POINT IV

PETITIONER AND AMICI HAVE NOT MET THE HEAVY BURDEN WHICH IS PLACED UPON PARTIES SEEKING TO HAVE A WELL-SETTLED, POLICY-BASED PRACTICE DECLARED UNCONSTITUTIONAL. DISPLACEMENT OF THE UNIVERSAL PRACTICE OF REVIEW FOR EXCESSIVENESS IS UNWARRANTED.

It is by now the settled rule in every circuit and in virtually every state that appellate courts have the power to reverse a judgment and order a new trial on grounds that an award of damages is excessive. The practice should not lightly be cast aside. In order to displace such a well-settled practice as unconstitutional, petitioner must dispositively satisfy a very heavy burden. *See Payton v. New York*, 445 U.S. 573, 600 (1980). This petitioner and his *amici* have clearly failed to do. As we demonstrated above, their arguments display an understanding of the Seventh Amendment and an historical analysis of the common law which are inaccurate in critical particulars. The arguments do not justify the drastic result sought on this appeal.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court recognized that the Constitution imposes a substantive limit on the size of punitive damages. The same, we submit, must be true with regard to compensatory damage awards. There is a line beyond which any award leaves the realm of compensation and enters the realm of excessiveness. In punitive damage cases it is a question of over-punishment. In compensatory damage awards, the question is one of over-compensation. In *Honda v.Oberg, supra*, 512 U.S. __, 29 L.Ed.2d 349, this Court observed that judicial review of an excessive verdict was "a well-established common-law protection against arbitrary deprivations of property", and cited to the availability of meaningful and adequate trial court review *as well as the availability of subsequent appellate review*, as among the procedural elements insuring that defendants will not arbitrarily be deprived of property. We submit that before one of these crucial safeguards is eliminated, this Court should overwhelmingly be convinced that appellate review for excessiveness and routine remittitur

practice are absolutely prohibited by the Seventh Amendment. Petitioner and his *amici* have failed to meet that burden.

As demonstrated above, English common law appellate courts were authorized to review and set aside excessive jury verdicts. At best, petitioner's arguments raise questions as to exactly what the scope of that appellate review was. Moreover, their version of history is belied by cogent historical analysis. See Judge Holmes' elaborate discussion in *Sunray v. Allbritton, supra*, 187 F.2d. at 477-489. Neither petitioner nor his *amici* have presented persuasive, irrefutable evidence supporting the notion that the Seventh Amendment precludes appellate review of an excessive jury verdict.

The problem of "runaway" verdicts is not new. Their impact is polycentric.[8] Focusing only upon so-called "blockbuster" or "mega-verdict" awards does not tell the whole story. Lesser verdicts are influenced upwards because "big" verdicts make "big" news so that jurors who read of a mammoth award may be influenced. Since only a small fraction of the mass of serious cases are tried, the "going rate" for settlement amounts also is critically affected by "runaway" awards. The upwards spiral feeds itself because attorneys and courts refer to the highest sustained awards for comparable exposures resulting in an

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8. See M. Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 Insurance L.J. 213, 226-231 (specifying sample high verdicts in reported cases; also results of a 15-month survey derived from a jury reporting service from July 1975 to September 1976 in which 45 torts awards and settlements exceeded $1,000,000, of which 17 were products cases); M. Hoenig, "'Runaway' Verdicts," *New York Law Journal*, May 24, 1984, p. 1, reprinted in M. Hoenig, Products Liability: Substantive Procedural and Policy Issues, Ch. 44, pp.337-344 (Product Liability Advisory Council Foundation 1992) (hereinafter "Hoenig, Products Liability") (discussing both a New York and a national trend toward higher-range multi-million dollar personal injury verdicts including awards of $12 million, $15 million, $21.5 million; $35 million; and even $100 million); M. Hoenig, "'Runaway' Verdicts and the Liability Crisis," *New York Law Journal*, June 30, 1988, p. 3, reprinted in Hoenig, Products Liability, Ch. 69, pp. 574-583 (discussing continued trend towards higher personal injury verdicts including awards in the $40 million range); M. Hoenig, "Reducing Excessive Verdicts," *New York Law Journal*, Aug. 25, 1988, p. 3, Products Liability , Ch. 71, pp. 595-601 (discussing what New York appellate courts are doing to reduce excessive verdicts under the "material deviation from reasonable compensation" standard of N.Y. CPLR 5501(c) and surveying reported cases involving remittiturs).

escalation of sustainable verdicts as well as settlements. In effect, yesterday's "ceiling" becomes today's "floor" and next year's "insufficient" or "inadequate" level.

Although many mundane tort exposures do not result in "runaway" verdicts, there are classes of serious injury exposures, commonly called "catastrophic" injuries (e.g., quadriplegia, paraplegia and brain damage) that inevitably lend themselves to overwhelming jury sympathy and constitute fertile subjects for impassioned and forceful advocacy. Claimants' counsel unabashedly make no apologies for developing strategies and tactics designed to maximize jury awards, a quest they sometimes euphemistically describe as seeking an "adequate" award. See Novok, *Presenting Plaintiff's Case*, 5 Am. Jur., Trials 611, 669 (1966) (urging emotional description of pain). Thus, for example, "day-in-the-life-of-the-plaintiff" videotapes dramatically depict the gravely injured plaintiff struggling to get through the day. The potential that juries will be emotionally influenced and prejudiced is great. See *e.g., Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987) (court articulates steps trial judge should consider to eliminate prejudice); *Grimes v. Employers Mutual Liability Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977) (prejudicial effect of plaintiff with his injured brother).

Further, there are certain classes of cases, which Rand Corporation's Institute for Civil Justice (ICJ) called "high stakes personal injury suits," in which the growth in average award "has been truly explosive reflecting increases ranging from 200 to more than 1,000 percent." Hensler, Vaiana, Kakalik & Peterson, *Trends in Tort Litigation, The Story Behind the Statistics*, Report No. R-3583-ICJ, at pp. 17-18 (The Institute for Civil Justice 1987) (Rand Corp., Santa Monica, Calif.). These "high stakes" suits include products liability, malpractice, business torts, and mass latent injury claims such as asbestos and Dalkon Shield. In a products liability or malpractice case juries were found "likely to award substantially more money" than in a routine auto case for an injury of the same severity. *ICJ Report*, at 21. Juries also awarded higher verdicts when defendants were institutions or organizations, which the study called the "deep pocket effect." Although the largest awards were later reduced, such reductions were

"smaller" when products liability or deep pocket defendants were involved. *Id.* at 21, 22.

The foregoing illustrations, barely scratching the surface of the many artful tactics and complex factors influencing jurors' issuance of "runaway" verdicts, show that safeguards imposed solely at the trial level are not enough. Appellate courts, even when exercising great deference to trial court discretion, frequently have to reverse for a variety of prejudices tolerated by trial judges. The same dynamics apply when it comes to excessive verdicts. Were it otherwise, new trials and remittiturs by appellate courts would not occur with frequency. But they do.

The purposes of tort law are to *fairly* compensate for injury and loss, to allocate and spread the risk of the costs of injuries, and to deter misconduct. See Keeton, Dobbs, Keeton, Owen, Prosser and Keeton On Torts, Ch. 1, § 4, pp. 20-26 (5th ed. 1984). None of these policies are served when excessive verdicts are sustained. On the contrary, when windfall awards slip through the review process these policies are undermined. One of the adverse consequences, among many, is creation of a "liability crisis" or "insurance crisis." See M. Hoenig, "'Runaway' Verdicts and the Liability Crisis," *New York Law Journal*, June 30, 1988, p. 3 (discussing discerning law review articles by Professor George L. Priest in the context of "runaway" verdicts); G.L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987); G.L. Priest, *The Liability Crisis*, Yale Law Report (Fall 1987). Professor Priest views evolution of expansive modern tort law as "chiefly motivated by the concern of courts to provide insurance to victims who have suffered personal injury." 96 Yale L.J. at 1525. But "exactly the opposite effect" has occurred. There is a "reduction in total insurance coverage available to society rather than an increase." *Id.* The result is regressive and hurts the poor. Thus the persons most drastically affected by expanded liability and the current insurance crisis are the low-income and poor, exactly the parties that courts had hoped most to aid. *Id.* at 1525, 1585-87. "Runaway" awards help fuel these problems. The role of appellate review in minimizing the foregoing problems was recently recognized by the Second Circuit in *Consorti v. Armstong World Industries, Inc.*, 72 F.3d 1003, 1009 (2d Cir. 1995).

Petitioner's strained argument that review of verdicts by trial courts is sufficient, (Pet. Br. at 38), places too great a reliance upon overworked and overburdened trial judges. It ignores as well the simple reality that trial courts, too, sometimes make mistakes, and sometimes abuse their discretion, or sometimes act upon misinformation by the parties or their counsel. The suggestion that appellate courts should have no choice but to rubber stamp a grossly excessive verdict - for example our hypothetical award of $100 million for an ankle injury in a simple slip and fall case merely because a grossly excessive award was not set aside by the trial court is untenable. Federal appellate courts independently have erected safeguards to insure that a denial of a new trial by the trial court is not lightly reversed. Circuit courts consistently hold that such trial court determinations are entitled to great deference. See, e.g., *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990); *Seidman v. American Airlines, supra*, 923 F.2d 1134. Further, tests such as "insufficiency of evidence", "material deviation from reasonably compensation" and "shock the conscience" impose additional standards guaranteeing that appellate relief for excessiveness is reached only after restrained consideration.

Experience shows appellate review to be an effective additional safeguard against excessive verdicts.[9] A valuable, widely accepted

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9. To illustrate the significance of the remittitur practice by appellate courts in controlling excessive awards, see, *e.g.*, *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1015 (2d Cir. 1995) cert. pet. filed ($12 million award for pain and suffering reduced to $3.5 million); *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1555 (7th Cir. 1990) (award of $4 million for breach of contract reduced to $525,000); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (award of $1.5 million for pain and suffering reduced to $750,000); *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1142 (5th Cir. 1991) (award of $487,000 for pain and suffering reduced to $227,000); *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990) (award of $8.3 million for *medical malpractice* reduced to $850,000 per statutory cap); *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir, 1985) ($2.8 million award for loss of consortium reduced to $892,000). Additionally, a leading treatise on products liability, citing a federal study, has noted the significant impact of post-trial activities, including remittiturs and appeals, on overall jury awards. See 4A American Law of

(continued...)

means of protecting against runaway verdicts should not be condemned as unconstitutional absent irrefutable proof that the constitution is violated. Such a showing has not been made. Instead, it appears that the practice of setting aside excessive verdicts and granting new trials and remittiturs was widely accepted by the common law as fully consistent with the right to a jury trial. The incorporation of such review into current federal practice, whether under an abuse of discretion standard or whether review of facts is required, is fully consistent with the practice at common law and does not offend the Seventh Amendment.

(...continued)

Products Liability 3d, Damages, para. 60:17, p. 45 ("Post trial activities . . . resulted in final outcomes different from the initial verdicts in 30 percent of all cases, having the net effect of reducing the total amount paid across all cases 43 percent.")

CONCLUSION

For all of the reasons set forth herein, *Amicus* urges this Court to affirm the order appealed from, and to uphold the practice of appellate review of excessive verdicts and issuance of remittiturs.

Respectfully submitted,

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No. 95-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

v.

THE CENTER FOR HUMANITIES, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF RESPONDENT

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CONSTITUTIONS, STATUTES AND RULES

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Fed. R. Civ. P. 59 ..... *passim*

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U.S. Const., amend. VII ..... *passim*

MISCELLANEOUS

Arthur L. Corbin, *The Laws of the Several States*, 50 Yale L.J. 762 (1941) 22

19 Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4509 (1982 & Supp. 1995) 7

1A James W. Moore et al., *Moore's Federal Practice* ¶ 0.309[1] (2d ed. 1995) 7,8

6A James W. Moore et al., *Moore's Federal Practice* ¶ 59.02 (2d ed. 1995) 5

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Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) 8

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business, trade and professional organizations in the United States. The Chamber represents the interests of more than 215,000 companies, as well as several thousand state and local chambers of commerce and trade and professional organizations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber has a significant interest in the questions presented in this case. Businesses such as those represented by the Chamber are the primary target of damage claims and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that such awards — whether they be compensatory or punitive — are not excessive and that they are imposed in a manner that is fair, rational, and consistent with constitutional principles of federalism and due process. As a frequent *amicus curiae* on punitive damages issues[2] the

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[1] Consent letters of the parties have been previously filed with the Clerk of the Court.

[2] The Chamber has filed briefs *amicus curiae* before the Court in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257 (1989); *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO*

(footnote continued on following page)

Chamber is particularly concerned that this Court continue to ensure federal appellate review of excessive punitive damage awards.

The Defense Research Institute ("DRI") is an organization of lawyers specializing in the defense of civil litigation. Its membership throughout the United States numbers in excess of 20,000. DRI seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of the law, and through testimony before Congress on selected legislation impacting the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system. DRI has filed *amicus* briefs in recent cases before this Court concerning issues of concern to its membership, including standards for excessiveness of punitive damages.

SUMMARY OF ARGUMENT

Petitioner attacks the validity of a Second Circuit ruling that applied a state law standard in a diversity case to determine that a jury award of damages upheld by the trial court

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(footnote continued from preceding page)
Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 1995 (No. 94-896); *Union Security Life Ins. Co. v. Crocker, petition for cert. filed*, 64 U.S.L.W. 3359 (U.S. Nov. 9, 1995) (No. 95-740).

was excessive. Petitioner argues that the Second Circuit's ruling was erroneous in two ways. First, Petitioner maintains that the Seventh Amendment bars appellate review of the trial court's action. Second, Petitioner argues that, assuming appellate review is constitutional, the Second Circuit erred by applying the state standard of excessiveness in its review rather than applying a standard formulated under federal common law. Both of these arguments should be rejected.

The historical background of the Seventh Amendment and the reasons why it does not bar appellate review are set forth persuasively in Respondent's brief and will not be repeated here. Rather, this brief will focus on the proper processes of review conducted by the trial court and the appellate court and explain the respective roles of state and federal law at both levels. It will detail (1) the importance of applying state law standards to determine excessiveness at both the trial and appellate levels, (2) the importance of federal appellate review in vindicating the interests of federalism, and (3) the need for federal courts to focus on actual practice of state courts reviewing awards for excessiveness (*i.e.*, comparative review) in ensuring that the federal courts apply state law in a manner consistent with the practice of state courts.

This brief will support the following conclusions:

1. *Trial court authority.*

As even Petitioner concedes, the trial court in a diversity action[3] may, consistent with the Seventh Amendment, grant a new trial, a partial new trial, or a remittitur of a damage award on the ground that the award is excessive. Judicial re-

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[3] The discussion in this brief applies not only to diversity actions in federal court, but also to other actions in a federal forum governed by state law such as the adjudication of claims founded on supplemental jurisdiction.

view of a jury verdict for excessiveness consists of three processes: (1) determination of the applicable standard of excessiveness; (2) application of the standard to the facts of the case; and (3) if the verdict is found excessive, determining the appropriate remedy. In determining the applicable standard of excessiveness, the trial court should look to state law. It should not merely restate the verbal formulation used by state courts as a standard for reviewing damage awards for excessiveness, but should carefully consider the actual outcomes reached by state courts reviewing damage awards. In applying the appropriate standard of excessiveness, the trial court should attempt to reach the same result as would the highest court of the State. If it finds the award to be excessive, the trial court should apply federal law to determine the appropriate remedy, *i.e.*, new trial, partial new trial, remittitur, *etc.*

2. *Appellate review.*

Federal courts of appeal have authority, consistent with the Seventh Amendment, to review the denial of new trial motions in diversity cases. In doing so, these courts do not directly review the verdict, but rather review the action of the trial court on the motion for new trial based on the alleged excessiveness. The trial court's determination of the proper substantive state standard of excessiveness is subject to *de novo* review inasmuch as it is a question of law. In contrast, the trial court's application of the state standard of excessiveness to the award in the case is reviewed under an abuse of discretion standard. The district court's selection of a remedy is also reviewed under an abuse of discretion standard.

3. *Relationship to Constitutional Due Process Standards in Punitive Damages Cases.*

In punitive damages cases, this Court has recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments establish a separate limit on the size of an

award. This limit is created under and defined by federal law. Even if an award of punitive damages is not excessive under the state law, a punitive damage award that exceeds the federal due process standard must be reversed.

I. TRIAL COURT REVIEW OF A JURY VERDICT FOR EXCESSIVENESS IN A DIVERSITY CASE REQUIRES ASCERTAINMENT AND APPLICATION OF STATE STANDARDS.

A. The Respective Roles of Federal and State Law in the Review of a Jury Verdict for Excessiveness in a Diversity Case Were Confirmed by the Court in *Browning-Ferris*.

Review of jury damage awards for excessiveness[4] on motions for new trial is a traditional function of trial courts at common law and even Petitioner concedes that the Seventh Amendment permits such review.[5] Petitioner correctly states

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[4] Contrary to the arguments of Petitioner and its *amici*, excessiveness review is distinct from review of the sufficiency of the evidence and is not review of a factual finding.

[5] There is no question that the power of a trial court to grant a new trial in a case tried before a jury is perfectly consistent with the Seventh Amendment. The original Judiciary Act of 1789 provided, "[T]hat all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law." 1 Stat. 83, *quoted in* 6A James W. Moore *et al.*, *Moore's Federal Practice* ¶ 59.02, at 59–9 (2d ed. 1995). As shown in the Brief of the Respondent, new trials were granted for excessiveness of jury verdicts at the time the Seventh Amendment was adopted. Similar language has survived in Rule 59 of the Federal Rules of Civil Procedure, which provides, in pertinent part, "A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . ."

that this Court addressed the appropriate standards of review for both federal trial courts and federal courts of appeals in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).[6]

However, as Respondent's Brief shows, Petitioner severely misstates the holding of that case. *Browning-Ferris* distinguished between whether damages were excessive and whether the proper remedy was applied. *Browning-Ferris* held that the question of whether damages are excessive is determined by state law. *Id.* at 279 ("The role of the district court is to determine whether the jury's verdict is *within the confines set by state law*. . . ." (emphasis added)). After the question of excessiveness has been determined according to state law, it is a question of federal law under Rule 59 of the Federal Rules of Civil Procedure what remedy (*e.g.*, new trial, partial new trial or remittitur) should be ordered. *Id.*; *accord T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1530 n.8 (11th Cir. 1985); *National Food Stores Inc. v. Utley*, 303 F.2d 284, 286-87 (8th Cir. 1962). The only case the Court cited in the relevant discussion in *Browning-Ferris, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), does not deal at all with the substantive question of whether an award is excessive, but rather with the procedural question of whether a party who has accepted a remittitur may also appeal it. *Donovan* applied federal law because the questions at issue were procedural and remedial in character.

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[6] *Browning-Ferris* concerned punitive damages, but its analysis is applicable to compensatory damages as well. That case was decided before this Court's decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), all of which recognized a separate federal standard of excessiveness for punitive damages under the Due Process Clauses. See Part III *infra* for consideration of the interaction of this separate standard of excessiveness with the *Browning-Ferris* analysis.

B. The Applicability of State Law to Test Excessiveness is Required by the Principles of Federalism Recognized in *Erie* and Its Progeny.

As *Browning-Ferris* implicitly recognized, the question of whether a damage award in a diversity case is excessive must be decided by state law under the principles of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Determination of the measure of damages for an action created under state law is part of substantive state law and is determined under *Erie* by state, not federal law. *See, e.g., Peters v. T.G. & Y. Stores Co.*, 707 F.2d 227 (5th Cir. 1983); 1A James W. Moore *et al., Moore's Federal Practice* ¶ 0.309[1], at 3105 n.27 (2d ed. 1995). Thus, numerous courts have held that in a diversity case the issue of whether the jury's verdict is excessive is determined by reference to state law, even though federal law determines whether a new trial should be granted.

This is not a case in which any federal rule or federal statute is inconsistent with the application of state law and where a choice must be made between following a federal rule and following state law. Other than the Rules of Decision Act, 28 U.S.C. § 1652 — which provides that state law governs absent a federal constitutional, treaty, or statutory provision to the contrary — no federal rule or statute tells a court how to measure excessiveness of damages in a diversity case.[7] The choice is between following state

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[7] It cannot seriously be contended that Rule 59 of the Federal Rules of Civil Procedure — or any federal rule — is the source of a requirement that excessiveness of a damage award in a diversity case be considered under a federal standard. Nothing in the language of the rule remotely suggests such a conclusion. However, to the extent that Rule 59 is invoked as the source of such a federal standard, this position cannot be supported. Federal rules established under the Rules Enabling Act may

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law or rejecting it and establishing excessiveness according to a court-developed federal common law. Establishment of a federal common law in this area is precisely what this Court said it would *not* do in *Browning-Ferris*. 492 U.S. at 279.

Since no inconsistent federal rule or statute is involved, the analysis of cases such as *Hanna v. Plumer*, 380 U.S. 460 (1965), is not applicable. Rather, this Court's analysis in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), provides the applicable standard. In *Walker*, the Court held that application of the *Hanna* analysis is premised on a "direct collision" between a federal rule and state law and held that "[s]ince there is no direct conflict between the Federal Rule and the state law, the Hanna analysis does not apply." *Id.* at 752. Where there is no direct conflict between a state and federal rule, state law must govern, either as a constitutional matter under *Erie* or on a statutory basis under the Rules of Decision Act. In confirming this rule in *Walker*, the Court

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not "abridge, enlarge, or modify any substantive right" created by state law. 28 U.S.C. § 2072. Many cases since *Erie* have held that in a diversity action a federal court must apply state law on questions that involve "substantive law" rather than "procedure." *See generally* 19 Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4509 (1982 & Supp. 1995). Under this standard, the determination of whether a damage award is "excessive" clearly involves the policy judgment by the State as to the appropriate measure of damages for out-of-court conduct rather than the procedure by which a matter is tried. The establishment of a measure of damages is substantive and not procedural, and the determination of what constitutes an excessive award is substantive because it involves state policies governing the behavior of parties outside the courtroom. *See, e.g., Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1011 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339); *Peters v. T.G. & Y. Stores Co.*, 707 F.2d 227, 229 (5th Cir. 1983); *Blasky v. Wheatley Trucking Co.*, 482 F.2d 497, 498-99 (6th Cir. 1973); 1A Moore, *supra*, ¶ 0.309[1], at 3105 n.27.

restated the two principal bases of the *Erie* doctrine: (1) the avoidance of forum-shopping and (2) avoidance of inequitable administration of the law. *Id.*

The problem of forum-shopping was at the heart of this Court's decision in *Erie*, and the desirability of limiting the potential for forum-shopping remains a significant consideration in choice of law questions. Contrary to Petitioner's conclusory statement that the substance of judicial review for excessiveness would not affect a plaintiff's choice of forum, a substantial difference in federal and state standards of judicial review on this issue would have a considerable effect on such choices.

This Court has previously recognized the crucial role played by judicial review in controlling excessive damage awards. In *Haslip*, it recognized that unlimited jury or judicial discretion in the fixing of punitive damages "may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. The Court held that appellate review, which included comparative review with other cases, provided a necessary and meaningful constraint on jury discretion. *Id.* at 22. In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Court held that judicial review of punitive damages awards for excessiveness was so significant a procedural protection that it was required by the Due Process Clause of the Fourteenth Amendment. Furthermore, even commentators who assert that the damages crisis facing the American justice system has been exaggerated — a view *not* held by *Amici* — have noted the profound effect of judicial excessiveness review on the outcome of cases. *See* Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 51 (1992). In light of this history, it would be unrealistic not to recognize that many litigants will select a forum based on the type of excessiveness review that will control in their cases. The potential applicability of different standards of

excessiveness in the same state — one state and one federal — would surely be a significant factor in determining the desirability of a federal forum. This motivation was explicitly recognized by the Ninth Circuit in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (9th Cir. 1951), where the court described the plaintiff as "apparently seeking the decision of a judge who would sustain a larger award than the state judge" on review for excessiveness and characterized the federal action as "a clear case of what is aptly called 'forum shopping.' " *Id.* at 563.

Even if there were no prospect of forum-shopping, the likelihood of "inequitable administration" of the law would require application of state law. *Walker,* 446 U.S. at 753. The maintenance of separate standards of excessiveness, one state and one federal, within the same State would also lead to inequitable administration of the law. Such a conflict in standards would create disparate results for similarly situated parties in the same jurisdiction. As this Court held in *Guaranty Trust Co. of New York v. York,* 326 U.S. 99 (1945), "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *Id.* at 112.

Petitioner's reliance on *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525 (1958) (P. Br. at 14), to support his argument that excessiveness should be determined with reference to a federal standard is misplaced. *Byrd* involved a claim under the South Carolina workmen's compensation act. Under that State's law, certain defenses under the act were to be decided by the court and not submitted to the jury. This Court held that the state policy of having the trial court decide the issue was not "bound up with the definition of the rights and obligations of the parties" created by South Carolina law. *Id.* at 536. It had instead evolved as an outgrowth of judicial review of administrative action under that State's statutory compensation scheme without explicit consideration of the responsibilities of judge and jury. *Id.* Under

the facts of *Byrd*, the Court held that federal policies concerning trial by jury should govern.

Byrd involved allocations of function between jury and judge. By contrast, this case does not involve the allocation of functions between jury and judge since both federal and state laws provide for review of jury verdicts for excessiveness. The question is not whether the court may review the award for excessiveness, but rather, when reviewing it, what substantive standard to apply. Moreover, unlike the state procedural rule in *Byrd*, the state standard of excessiveness is "bound up with the definition of rights and obligations of the parties created by state law."

C. In Applying the State Standard of Excessiveness, the Federal Courts Should Compare the Verdict to Actual Results of State Cases and Not Simply Apply the Verbal Formulation Applied by the State Courts.

Where a federal court in a diversity case applies state excessiveness law under *Erie*, its goal should be to ensure that the damages award does not exceed that which would be sustained by the State's highest court. In order to accomplish this goal, the federal court ought to consider *all* the sources of law that provide guidance about what the result would be in state court. *See, e.g., Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984). This matter is discussed *infra* at pp 18-21 in the context of appellate review. The same arguments apply to trial court review.

II. APPELLATE REVIEW OF THE TRIAL COURT'S EXCESSIVENESS DECISION ACCORDS WITH THIS COURT'S HOLDINGS AND IS NECESSARY TO PROTECT THE INTERESTS OF FEDERALISM.

A. Appellate Review of a District Court's Denial of a Motion for a New Trial under Rule 59 on Excessiveness Grounds Is an Important Procedural Protection.

Respondent's brief shows that the Seventh Amendment does not bar appellate review of the district court's denial of a motion for new trial under Rule 59 on the ground that a damage award was excessive. In the absence of a constitutional bar, there is no legal basis for excluding such review. Moreover, this appellate consideration provides an essential protection against arbitrary results in an area of the law in which judicial review has historically provided a bulwark against such outcomes. *Honda Motor Co. v. Oberg*, 114 S. Ct. 114 S. Ct. 2331, 2341-42 (1994).

The United States courts of appeal have jurisdiction of appeals from "all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. Moreover, federal appellate courts have plenary authority to review the orders of federal district courts. *See* 28 U.S.C. § 2106. Petitioner does not suggest that the denial of a motion for a new trial is not a final decision, nor does he suggest any legal basis — other than the Seventh Amendment — to preclude such review. Thus, unless the Seventh Amendment bars their review, the courts of appeal have jurisdiction to review excessiveness decisions of the district courts.

Although Petitioner argues that there is no need for appellate review of final district court action, his position is altogether at odds with the established mode of litigation in federal courts. It should not be incumbent on Respondent to show why appellate review is required. Rather, Petitioner bears the heaviest of burdens to show why in this particular class of cases the ordinary rules of appellate jurisdiction do not apply. In fact, however, there are overwhelming arguments why appellate review for excessiveness is an important and mandatory procedural protection.

Appellate review in diversity cases promotes important aims of the federal system. As this Court recently declared:

> [A]ppellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in Erie. The twin aims of the Erie doctrine — 'discouragement of forum-shopping and avoidance of inequitable administration of the laws' — are components of the goal of doctrinal coherence advanced by independent appellate review. . . . [D]eferential appellate review invites divergent development of state law among the federal trial courts even within a single State. Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum.

Salve Regina College v. Russell, 499 U.S. 225, 234 (1991) (quoting *Hanna*, 380 U.S. at 468) (citations omitted).

These values are particularly important in protecting litigants from arbitrary or excessive damage awards — an area in which this Court has recognized the central importance of judicial review. *See Honda*, 114 S. Ct. at 2339-41. Moreover, precisely because excessiveness is a difficult concept to define and measure with precision, the need for some centralized decision-making authority within the federal judi-

ciary is particularly evident. If each district court within a State were free, without the constraint of appellate review, to determine excessiveness for itself, the prospect for confusion and inconsistency between federal courts in the same State would increase.

Furthermore, the abolition of appellate review would make it more difficult to avoid conflicts between state and federal authority. If, as occurred in this case, a federal court upheld a judgment that was inconsistent with state law, the court of appeals would have no way to rectify the conflict. This problem is especially troublesome since the federal judgment would then become a benchmark for the reasonableness of future awards, and a state system designed to control the level of awards would be undermined.

In addition to these considerations of federalism, there are also reasons rooted in the institutional structure of courts of appeal that argue for retaining the normal process of appellate jurisdiction in this area. *See First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995) (citing institutional advantages of appellate courts as a basis for determining their appropriate attitude in reviewing decisions of the district courts). Determinations of excessiveness involve conclusions based upon inherently imprecise standards. This fact alone counsels for some centralization of review in order to preserve a modicum of consistency in the face of otherwise rather vague principles. Without the sober reflection of appellate review, comparability of results in similar circumstances would be far more difficult to ensure.

Additionally, review by the courts of appeal adds a different and significant value that trial court review lacks. Unlike trial courts that must address a multitude of issues under severe time constraints, appellate courts function collegially in multi-judge panels that permit "reflective dialogue and collective judgment." *Salve Regina*, 499 U.S. at 232. For a difficult and challenging task such as the application of

consistent rules about excessiveness, there is no warrant for a dramatic departure from normal appellate procedure to eliminate these reflective collegial values.

For these reasons, every State and federal jurisdiction now permits appellate review of trial court determinations of excessiveness. It is no accident that all thirteen courts of appeal in the federal system have found appellate review of excessiveness determinations by district courts to be required. *See Grunenthal v. Long Island R.R.*, 393 U.S. 156, 157 n.3 (1968); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580-81 (Fed. Cir. 1992); *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1529-31 (11th Cir. 1985). Moreover, such review is required in all 50 state court systems as well — a fact reflective of the general recognition that appellate consideration of these matters serves important values. *See Honda*, 114 S. Ct. 2338 (noting that judges review damages awards in every State but Oregon and ordering Oregon's courts to review such matters for due process violations); *Dagnello v. Long Island R.R.*, 289 F.2d 798, 799-80 n.1 (2d Cir. 1961); *City of Nome v. Ailak*, 570 P.2d 162, 173-74 (Alaska 1977); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992).

It is clear that appellate review of trial court judgments for excessiveness serves an important purpose because appellate tribunals can and do alter the results of cases. Although the courts of appeal appropriately accord substantial discretion to trial courts' determinations of excessiveness, on occasion, and in important ways, they do intervene to

change results that would be contrary to law.[8] Moreover, without appellate review of excessiveness determinations by district courts, there would be no means to review decisions that are strikingly significant to the fair administration of justice. For example, under the rule advocated by Petitioner, the district court's affirmance of the punitive damage award of $5 billion against Exxon in the Exxon *Valdez* case would not be reviewable. *See In re Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988 (D. Alaska Jan. 27, 1995). Although that award may ultimately be upheld on appeal, it would be strange indeed to carve out a unique exception to customary standards of review to insulate such extraordinary awards from appellate scrutiny.

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[8] *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (reducing punitive damage award from $2 million to $1 million), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993); *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (reducing punitive damage award from $25 million to $12.5 million), *cert. denied*, 504 U.S. 910 (1992); *Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990) (reducing punitive damages award from $1.5 million to $500,000), *cert. granted, judgment vacated, case remanded*, 499 U.S. 915, *appeal vacated as moot*, 935 F.2d 1105 (10th Cir. 1991); *Simon v. Shearson Lehman Bros.*, 895 F.2d 1304 (11th Cir. 1990) (reducing punitive damages award from $8 million to $1 million); *Kelley v. Sears, Roebuck and Co.*, 882 F.2d 453 (10th Cir. 1989) (new trial because punitive damages award of $1.25 million found to be based on passion and prejudice); *DeRance, Inc. v. PaineWebber, Inc.* 872 F.2d 1312 (7th Cir. 1989) ($20 million punitive damages award found excessive); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (ordering new trial because $2.5 million punitive damages award found excessive); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988) (reducing punitive damages award from $1 million to $250,000), *cert. denied*, 490 U.S. 1006 (1989); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597 (5th Cir.) (ordering new trial because of excessiveness of $5 million punitive damages award), *cert. dismissed*, 486 U.S. 1027, *cert. denied*, 488 U.S. 848 (1988); *see also Zazú Designs v. L'Oréal ,S.A.*, 979 F.2d 499 (7th Cir. 1992).

Finally, recognition of the need for appellate review is necessary to assure vindication of substantive due process rights recently recognized by this Court. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Court explicitly recognized that the Due Process Clause imposed a substantive limit on the size of punitive damage awards. Although the protection from grossly excessive awards under the Due Process Clause functions differently from the state-created excessiveness limits (*see* Part III *infra*), a blanket holding that the Seventh Amendment bars appellate review of such awards would prevent federal appellate courts from vindicating that right.

B. The Court of Appeals Should Review the District Court's Determination of the State Law of Excessiveness *De Novo*.

The determination of the state standard of excessiveness by the district court is a question of law that is subject to *de novo* review in the appellate court. In *Salve Regina College v. Russell,* this Court rejected an argument that the courts of appeal should apply "deferential review" to a district court's determination of state law and held that "a court of appeals should review *de novo* a district court's determination of state law." 499 U.S. at 231. The Court recognized the institutional values served by *de novo* appellate review of the determination of state law and found that "independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Id.*

As the Court has recognized, the expertise of district courts in matters involving state law should inform the structure and content of its conclusions of law and thus become evident to the reviewing court. *Id.* at 232. However,

"independent review . . . does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Id.* at 232-33.

As shown above, the determination of the state law standard of excessiveness must include not merely a recitation of the verbal formulation state courts apply in evaluating an award (*e.g.*, "shocks the conscience," "grossly excessive," "monstrous," *etc.*), but also an analysis of the results state courts actually reach in reviewing an award for excessiveness. In establishing standards for the measurement of damage awards, most States employ one or more of several verbal formulations, none of which fully describes the content of such review. As this Court recently observed, "[a]lthough courts . . . use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' " *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 n.5 (1994).

Under these circumstances, it is extremely important for a federal court to look beyond the verbal formulations employed by the state courts to determine how they are actually resolving cases involving excessiveness. Probing beyond the mere recitation of the verbal standard is vital since a relatively consistent and meaningful state practice may exist which provides more significant guidance than do the often uninformative verbal guidelines. The level of the inquiry must be guided by the purposes of *Erie*. Since the goal of a federal court sitting in diversity is to apply the same law as that applied by a state court to the facts of a case, a searching inquiry of all sources of law is required — including an analysis of the results state courts actually reach in reviewing damage awards. Failure to apply the state substantive

standard of excessiveness in the manner the State itself actually applies it would lead to inequitable administration of justice, as similarly situated litigants in the same State would not receive comparable treatment. *See Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1009 (2d Cir. 1995) ("It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation . . . . ; [g]reat discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation."), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339); *cf. Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases).

The Second Circuit, like several other circuits, has emphasized the importance of comparative analysis in its review of the district court's finding of state law and has looked beyond the verbal formulations employed. In *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740 (2d Cir. 1984), the court applied a "shocks the conscience" test but held that, (1) "we . . . have the responsibility to ensure 'that the damage award does not exceed that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim,' " *id.* at 750 (quoting *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 472 (8th Cir. 1977)), and (2) "we look, as a court sitting in diversity, to other jury awards condoned by the courts of the state whose substantive law governs the rights of the parties . . . ." *Id.* This resort to examination of the actual practice embodied by the state cases is far more significant to the result than application of the "shocks the conscience" test.

Perhaps the clearest articulation of the proper approach to be used by a federal court, where the verbal formulation of the state standard differs from the traditional "shock the conscience" test, was made by Judge Sifton in *In re Joint E. & S.*

Dist. Asbestos Litig., 798 F. Supp. 925 (E.&S.D.N.Y. 1992), *rev'd on other grounds*, 995 F.2d 343 (2d Cir. 1993), and *rev'd on other grounds sub nom. Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). After noting that the verbal formulation adopted by New York differed from the federal standard, the court stated:

> For the purpose of a federal court's remittitur decision, however, the two standards work in harmony. It "shocks the conscience" of a federal judge for a federal court sitting in diversity to allow a verdict which would necessarily be remitted as a matter of law by a state court using the appropriate state standard.

Id. at 937.

Similarly, in *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1012-15 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339), the Second Circuit criticized the district court for looking to a federal decision as a guide for excessiveness and ignoring state cases. Other circuits have also adopted the practice of looking carefully at actual state decisions in determining the standard of excessiveness under state law. *See, e.g., Marcel v. Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994) ("We review a claim of excessiveness by comparing the awards at issue with rulings in other factually similar cases decided under controlling law, here Louisiana law."); *cf. Johnson v. United States*, 780 F.2d 902, 908 (11th Cir. 1986) (comparing FTCA awards to awards rendered under state law); *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 86 (1987) (same). The fundamental principles requiring this type of review are encapsulated by the venerable directives of this Court that a "federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State,' " *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (quoting

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108 (1945)), and that "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *York*, 326 U.S. at 112.

C. Application By the District Court of the State Standard of Excessiveness to the Facts of the Case Should Be Reviewed on an Abuse of Discretion Basis.

In contrast to the determination of the state standard of review — which is a pure question of law — application of the standard to the facts of a particular case is a mixed question of law and fact for which a more deferential standard of review is appropriate. As this Court has recognized, district judges who have presided over the trial of cases should be accorded a higher degree of deference in matters involving mixed questions of law and fact or the detailed supervision of litigation. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Miller v. Fenton*, 474 U.S. 104 (1985). Thus, the application of the legal standard of excessiveness to the facts of the particular case should be reviewed under an abuse of discretion standard.

Although the abuse of discretion standard itself is derived from federal law, the application of the standard should be guided by overriding *Erie* principles. The trial court should exercise its discretion to determine whether a particular award is excessive with the goal of assuring that the damage award does not exceed that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim. *Martell*, 748 F.2d at 750; *Hysell*, 559 F.2d at 472. Such a determination should be based on its analysis of all sources of state law — and most

especially on the actual practice of the state courts.[9] There may be reasons why awards in past cases do not offer an accurate or complete guide to determining how the State's highest court would resolve a case. For example, if the only comparable cases were decided in the distant past, the damage awards upheld might have little predictive value about what conclusion the State's court of last resort would reach now. Differences in fact patterns might also account for differences in verdicts. However, the fact that comparative review is not the sole determinant of the award does not mean that courts may simply ignore such important data. Where a trial court ignores a pattern of state practice without articulating its reasons, it has thereby necessarily abused its discretion.

D. The District Court's Choice of a Remedy Is Governed by Federal Law and Is Reviewable Under an Abuse of Discretion Standard.

Browning-Ferris confirmed that, while state law governed with respect to review of a damages award for excessiveness, federal law governs the choice of a remedy (*i.e.*, new trial, partial new trial, and remittitur). Federal courts of appeal have recognized this distinction. *See, e.g., Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir. 1991). Thus, a federal court may order remittitur even though state law does not recognize the remedy of remittitur. *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 n.2 (8th Cir. 1988); *Hale v. Firestone Tire & Rubber Co.*,

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[9] *Cf.* Arthur L. Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 774 (1941) ("The court of the forum should use the very same juristic data in determining the rights of litigants, whether the forum be a federal court or a state court. . . . If the federal judge is required to disregard some of those available data, the litigant is not getting the same justice that he would get if the forum were a court of the state.")

820 F.2d 928, 936 n.1 (8th Cir. 1987). The trial court's choice of remedy is then reviewable under an abuse of discretion standard. *Browning-Ferris*, 492 U.S. at 277.

III. THE DUE PROCESS CLAUSE PROVIDES AN INDEPENDENT LIMIT ON PUNITIVE DAMAGE AWARDS.

The preceding discussion concerns judicial review of damage awards in diversity cases under state law standards. In *Haslip*, the Court stated that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. In *TXO*, a majority of the Court agreed that "the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award." 113 S. Ct. at 2718. In *Honda*, this Court declared that "our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards. . . . A plurality in TXO assented to the proposition that 'grossly excessive' punitive damages would violate due process." *Honda*, 114 S. Ct. at 2335. Although this Court has not provided guidance as to the content of this standard, at least one court of appeals, in an opinion by retired Justice White, has found an award excessive under the *TXO* standard. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658-61 (8th Cir. 1995).

The standard established in these cases recognizes that the federal Constitution provides protection against an award that is arbitrary and excessive, *even if such an award would be permitted under state law*. Thus, there is a federal standard, based on federal law, that may apply to limit a punitive award that would not otherwise be found excessive under state law. Conversely, a punitive award that might not be ex-

cessive under the federal due process standard might still be excessive under a state law that is more restrictive.[10] Thus, in a punitive damages case *both* the state standard of excessiveness and the federal due process standard potentially limit an award of damages, and the fact that an award might pass muster under state standards does not necessarily mean that it would be upheld under the federal constitutional due process standard.

As noted above, this Court must consider the effects of Petitioner's arguments on the rights of litigants to a proper adjudication — including appellate judicial review — of their federal due process claims. The Court has "stressed the availability of *both* meaningful and adequate review by the trial court and subsequent appellate review." *Honda,* 114 S. Ct. at 2335 (emphasis added). Moreover, this Court went on to recognize the importance of judicial review of the size of punitive damage awards as a "safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.*

Petitioner's argument is at odds with these constitutional protections. The elimination of appellate judicial review of punitive damage awards for excessiveness would leave litigants without a procedure to vindicate their constitutional rights. This Court should avoid an interpretation of the Seventh Amendment that would effectively nullify rights guaranteed by other provisions of the Constitution.

Whatever the outcome of this case, this Court must recognize: (1) that the federal constitutional protection against

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[10] In *TXO*, a majority of the Court agreed that "a violation of a state law 'reasonableness' requirement would not . . . necessarily establish that the awards is so 'grossly excessive' as to violate the Federal Constitution." 113 S. Ct. at 2720.

excessive punitive damages is a separate and independent limitation from state excessiveness standards; and (2) that adequate procedures to ensure judicial appellate review to vindicate this federal right must be preserved.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed, and the Court should hold: (1) that the Seventh Amendment does not bar appellate review of jury verdicts for excessiveness; (2) for purposes of determining whether a damage award is excessive, a federal court in a diversity case is to determine excessiveness by determining that the award does not exceed the award which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim; and (3) the federal constitutional limitation of punitive damages under the due process clause imposes a limit on punitive damages separate from the state limit, and procedures for full judicial appellate review under this standard must be protected no matter what outcome is reached.

Respectfully submitted,

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FOR ARGUMENT

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No. 95-719

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

- v. -

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

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No. 95-719

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of affirmance of the decision and judgment of the United States Court of Appeals for the Second Circuit, dated and entered September 12, 1995. In that decision, the Court of Appeals reversed a judgment of the United States District Court for the Southern District of New York (Brieant, J.), after a jury trial, awarding damages against defendant-respondent, The Center for Humanities, Inc., in the amount of $450,000 for the loss of

300 slide transparencies belonging to plaintiff-petitioner William Gasperini, and remanded for a new trial on the issue of damages, unless Gasperini agreed to remit all damages in excess of $100,000 (Pet. App. 1a-10a). *See Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *cert. granted*, __ U.S. __, 116 S.Ct. 805 (1996). In concluding that the jury's award was excessive given Gasperini's failure to make an effective showing that all of the lost transparencies were unique and the strong evidence of his limited earning power as a photographer, the Court of Appeals noted that "the object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket" or a "financial windfall." *Id.* at 429.

Applying the principles articulated in *Consorti v. Armstrong World Indus.*, 64 F.3d 781 (2d Cir. 1995)(withdrawn), *superseded by*, 72 F.3d 1003, 1009-1013 (2d Cir. 1995), *pet. for cert. pending* (U.S. 95-___), that when New York substantive law governs a diversity case, the federal court looks to New York decisions for guidance on the issue of excessiveness of damages, the Court's review of relevant New York law on lost transparencies further supported its conclusion that the jury's award was excessive. *Id.* at 430. The Court applied New York law governing the standard for appellate review of itemized jury verdicts, *see* N.Y. Civ. Prac. L. & R., § 5501(c), which provides that the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." *Id.* at 430. Although recognizing that this standard accords less deference to the jury's award than the traditional "shock the [judicial] conscience" standard, the Court found that because this is a diversity case, it was "bound to follow the standard set forth in the New York statute." *Id.*, citing *Consorti*, 64 F.3d at 789-790.

The City has a strong interest in this Court sustaining federal appellate review and the application of N.Y. Civ. Prac. L. & R., § 5501(c), in diversity cases. Unlike the State of New York, which has Eleventh Amendment immunity in federal court and exclusive non-jury state Court of Claims jurisdiction as to claims for monetary damages, municipalities, such as the City, have no sovereign immunity, *see* N.Y. Ct. of Claims Act, § 8, and must rely on appellate review of jury verdicts to help rein in excessive awards. Moreover, the City is self-insured and pays judgments from a budget allocation for that purpose.[1]

The effects of spiralling tort jury verdicts relate directly to the City's ability to provide vital public services, especially because the demands for such services and associated regional costs are uniquely high. The City has an overwhelming interest in preventing the award of judgments which are grossly disproportionate to the injuries suffered, thereby eliminating open-ended financial exposure, saving taxpayer dollars, and freeing up judicial and other litigation resources for use in other areas, without unfairly limiting rightful recoveries of injured persons.

The City of New York is the quintessential "deep pocket." As the Nation's largest municipality, the City of New York pays more in tort judgments than any other municipality in the country. In 1994, the City paid out some $275 million to tort plaintiffs who claimed injury by City employees. Put in perspective, that amount -- 1,000% more than the $24.2 million paid out in 1977 -- would enable the City to put over 6,000 new police officers on duty or over 7,500 teachers into

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[1] The City's huge personal injury budget exceeds the individual operating costs of no less than sixty-one of its seventy-five separate agencies.

the City's classrooms. This enormous increase in tort judgments results in a projection that the City will have to pay 2.1 billion dollars to resolve just its pending claims, more than 55,000 of them.

The number of lawsuits filed against the City is staggering: 12,000 new suits were commenced during 1995. Adding that number to the roughly 55,000 pending cases, the 67,000 total easily makes the City the most commonly sued entity in the State and, probably, in the entire nation. *See Annual Report 1995*, New York City Law Department, Office of the Corporation Counsel, p. 58.

The City is like no other litigant, for no ordinary defendant confronts liability over so broad a spectrum of activities: the City provides housing, education, child care, firefighting, sidewalks, roadways, recreational facilities, and medical services. Given that the City "owns" 6,374 miles of streets and hence nearly twice that, or approximately 12,000 total miles of sidewalk, it is not surprising that well over one-third of City tort suits arise from alleged injury resulting from cracked sidewalks, potholes, or pavement obstructions.

Moreover, studies have shown that where the defendant is a corporation, insurance company or governmental entity rather than an individual, the jury is more likely to render a large verdict. Ostrom, Rottman and Hanson, *"What are Tort Awards Really Like? The Untold Story from the State Courts"*, 14 Law and Policy, p. 77 (1992).

At any one time, there are fifty to one hundred diversity actions pending against the City in the United States District Courts for the Southern and Eastern Districts of New York. The application of the New York excessiveness standard in

these cases not only promotes New York State's interest in curbing disparate verdicts, but also will aid in the settlement of diversity actions. In order to be appropriate cases for settlement, it is critical for the defendant City to know what a sustainable verdict would be. In a diversity action, in order to assess its risk exposure, the City looks to New York state law and expects those standards to be applied. If they are not, it will greatly interfere with the City's ability to assess the case and potentially settle it for a reasonable sum.

As the lawyers for the self-insured City, having federal appellate courts review and apply the New York state standard is especially important for assessing future risk and determining budget allocations. Predictability for the City is also particularly desirable in that the office of the Corporation Counsel of the City of New York handles virtually all the myriad personal injury and property damage cases for the City in-house, with a few exceptions for certain medical malpractice cases. In addition, the Corporation Counsel also represents many public benefit corporations and authorities, including the New York City Health and Hospitals Corporation, the New York City Housing Authority, the New York City Off-Track Betting Corporation and the New York City Transit Authority.

Finally, the City and its Mayor, Rudolph W. Giuliani, have taken the lead in advocating broad tort reform both nationally and locally. *See, e.g., Annual Report 1995*, New York City Law Department, Office of the Corporation Counsel, p. 60; Statement of Rudolph W. Giuliani, Mayor of the City of New York, Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, "*The Cost to Municipalities of the Current Tort System*," May 2, 1995. These efforts, however, will be undermined if federal appellate courts cannot review damages

awards by juries in diversity actions using the same reasonableness standard that the New York State appellate courts apply pursuant to N.Y. Civ. Prac. L. & R., § 5501(c).

SUMMARY OF ARGUMENT

The standard set forth in N.Y. Civ. Prac. L. & R., § 5501(c) for determining whether a jury award is excessive is a matter of substantive state law and the Second Circuit properly determined that it should be applied in reviewing whether the award in this case was excessive. The pertinent provision of § 5501(c) was added by the State Legislature in 1986 on behalf of the citizenry of New York to curb spiralling jury awards, following a multi-year effort culminating in various recommendations for tort reform. *See generally Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance* (April 7, 1986, chaired by former Court of Appeals Judge Hugh R. Jones). By enacting this provision, the State Legislature has determined that a plaintiff should not be permitted to recover any amount above this standard in tort. A federal court is constitutionally required to apply state law to state claims.

Further, the failure to apply this standard in diversity cases may result in the inconsistent administration of state law since the amount of recovery may turn on whether the case is brought in state or federal court.

Finally, the application of the New York standard does not require an appellate court to review findings of fact, only to apply the applicable standard to the factual record. Thus, the review of a jury award pursuant to this standard does not violate the Seventh Amendment.

ARGUMENT

THE NEW YORK STATE LEGISLATURE, IN AMENDING N.Y. CIV. PRAC. L. & R., § 5501(c), INTENDED TO LIMIT THE AMOUNT A PLAINTIFF CAN RECOVER IN TORT. UNDER *ERIE R.R. CO. V. TOMPKINS*, 304 U.S. 64, 78 (1938) AND ITS PROGENY, A FEDERAL APPELLATE COURT, SITTING IN DIVERSITY, MUST APPLY THE SUBSTANTIVE STANDARD SET FORTH IN N.Y. CIV. PRAC. L. & R., § 5501(c), WHEN REVIEWING THE EXCESSIVENESS OF A JURY AWARD.

As more fully set forth in the City's Statement of Interest, the City is the most commonly sued entity in New York State and was one of the driving forces behind the 1986 amendment to N.Y. Civ. Prac. L. & R ("CPLR"), § 5501(c). For that reason, the City will focus this brief on that provision and its application in federal diversity cases, and will not brief separately the issue whether the Seventh Amendment precludes federal appellate review of jury awards except as it specifically relates to the New York excessiveness standard. The City respectfully refers this Court to the respondent's brief for a complete exposition of the Seventh Amendment issue.

CPLR § 5501(c) was amended by Chapter 682 of the Laws of New York in 1986 to add the following provision:

> In reviewing a money judgment in an action ... in which it is contended that the award is excessive or inadequate and that a new trial should have

> been granted unless a stipulation is entered to a different award, the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Prior to the 1986 amendment, there was no specific reference in the CPLR regarding an appellate court's powers to review a jury award. However, the authority of New York appellate courts to review the excessiveness of a jury verdict was well-established in common law. Under common law, the New York appellate courts were limited to the inquiry whether the award "shocked the conscience of the Court." *See, e.g., Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 428 N.Y.S.2d 535 (4th Dept., 1980); *Petosa v. City of New York, Dep't of Sanitation,* 63 A.D.2d 1016, 406 N.Y.S.2d 354 (2d Dept., 1978). Courts, however, applied this review power sparingly and, thus, appellate review did not effectively control spiralling jury verdicts. [2]

In the 1980's, New York was faced with a crisis involving spiralling tort jury awards against government as well as private entities in the state. Government entities had to devote more and more budgetary resources for payment of such awards. Additionally, spiralling awards resulted in raising insurance costs to the public. In response to this crisis, the State Legislature undertook a series of major tort reforms, including the 1986

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[2] "When Courts fail to exercise responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti, supra*, 72 F.3d at 1010.

amendment to CPLR § 5501(c) which sets forth a substantive standard for determining whether a jury award is excessive. *See,* Legislative findings and declaration, Chap. 266 of the Laws of 1986, § 1, 1986 McKinney's Sess. Laws of N.Y. p. 470 (the Legislature states that the amendment to CPLR § 5501(c) was one of the several reforms enacted "to restrain increases in medical and dental malpractice premiums and related costs"). *See, generally, Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance* (April 7, 1986, chaired by former New York Court of Appeals Judge Hugh R. Jones).

The Legislature found that the existing "standard for appellate adjustment of damages in personal injury actions -- *i.e.,* whether the award is so excessive or inadequate as to shock the conscience of the court -- provided for insufficient review of awards and the new standard . . . [the "deviates materially" standard in CPLR § 5501(c)] will invite more careful appellate scrutiny." Legislative findings and declaration, Chap. 266 of the Laws of 1986, §1, 1986 McKinney's Sess. Laws of N.Y., p. 470.

The 1986 amendment was intended to "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Governor Cuomo's Approval Memorandum of L. 1986, ch. 682, 1986 McKinney's Sess. Laws of N.Y., pp. 3182, 3184. Thus, the Legislature, in enacting the "deviates materially" standard, intended to set a limit on the recovery for torts and to bar the recovery of amounts which exceed that standard.

The Legislature's intent to set a substantive standard of allowable recovery for state-created torts in section 5501(c) is evidenced by the fact that when the Legislature amended section 5501(c), it also added a new provision, CPLR, § 5522(b).[3] That provision requires the Appellate Division, in deciding any appeal contesting an award as excessive pursuant to section 5501(c), to set forth the reasons for its decision. The Legislature envisioned that such discussion would aid courts in future cases in determining the reasonable range of permissible recovery and in time would result in a body of common law.

In addition to being a vital check against excessive jury awards, review under section 5501(c) provides guidance to parties in assessing their cases. One commentator, in discussing section 5501(c), noted that "[e]ach side must come away from settlement negotiations thinking the result, though not ideal, is essentially fair . . . Appellate decisions play a major role in helping to shape those [parties'] expectations." T. Newman, New York Appellate Practice, § 4.10 (Matthew Bender & Co., 1994). The significance of a party's ability to assess exposure should not be minimized. For example, over 90 percent of the City's tort cases are settled before verdict. *1995 Annual Report*, New York Law Department, Office

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[3] CPLR § 5522(b) provides:

> (b) In an appeal from a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter.

of the Corporation Counsel, p. 59. Thus, the legislative provision of appellate review pursuant to § 5501(c) allows a needed measure of consistency and stability and, by reducing the incentive to litigate, serves not only the defendant, but also hastens delivery of compensation to a meritorious claimant.

The "deviates materially" standard of CPLR § 5501(c) is not a practice procedure. It was enacted to limit monetary exposure for tort claims. It was intended to shield a defendant from substantive tort recovery for any amount beyond the limit set forth in that provision. It is analogous to a statutory damage cap in that a jury award is sustainable only if it does not deviate materially from the range determined by the reviewing court to be reasonable. It differs only from a cap in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law. New York's standard cannot be characterized as irrational since, as the Second Circuit stated in this case, the "object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket." 66 F.3d at 429.

Petitioner's characterization of the "deviates materially" standard as a procedural provision is based on a misunderstanding of the operation of that provision in New York. Petitioner argues that the "deviates materially" standard "is used to determine the point at which the fact-finding power shifts from the jury to the Appellate Division" (Pet. Br., 19). This argument is meritless. In New York, under a separate provision of CPLR § 5501, the Appellate Division has the power to review findings of facts and law. When called upon to do

so, the Appellate Division will first determine the disputed facts and then apply the applicable law. However, where only the issue of excessiveness is raised and there is no factual dispute, such as in this case, the determination whether an award is excessive or inadequate is based upon an examination of the legal standard set forth in CPLR § 5501(c) and relevant case law. *See, e.g., Johnston v. Joyce*, 192 A.D.2d 1124, 596 N.Y.S.2d 625 (4th Dept., 1993); *Brown v. Horn*, 179 A.D.2d 1073, 578 N.Y.S.2d 951 (4th Dept., 1992); *Witmer v. Smith*, 179 A.D.2d 1026, 580 N.Y.S.2d 914 (4th Dept., 1992) (examples of cases where the Appellate Division ordered a new trial after determining, as a matter of law, that the jury award "deviate[d] materially from what would be reasonable compensation").

Moreover, the ability of a federal appellate court to apply the "deviates materially" standard in reviewing the excessiveness of a jury award, without the need to re-examine findings of fact, is demonstrated in both *Consorti* and the instant case. In both, the Second Circuit applied the standard of excessiveness furnished by state law, employing decisions of the state courts in comparable cases which indicate at what points awards become excessive. *Consorti*, 72 F.3d at 1013; *Gasperini*, 66 F.3d at 430-431. Thus, while appellate excessiveness review requires an application of the law to the factual record, it does not require a re-examination of the facts.

The State's highest court, the New York Court of Appeals, has held that the review of jury verdicts does not require a re-examination of the facts and thus, does not violate the New York State Constitution's guarantee to a

jury trial (Art. I, § 2), *see, O'Connor v. Papertsian*, 309 N.Y. 465, 473, 131 N.E.3d 883, 887 (1956), stating:

> The Appellate Division thus "properly [places] a value on the connected injuries as high as any jury would be warranted in going and [gives] the defendants the opportunity of stipulating to pay such an increased verdict in lieu of suffering a new trial." The plaintiff cannot claim that she is being deprived of her trial by jury because of the Appellate Division's action in giving her the maximum amount she would be allowed to recover by a jury verdict as a matter of law. Had she received a verdict in excess of that sum, the Appellate Division could have set it aside as excessive.
>
> In the present case the Appellate Division is not reversing a factual finding by the jury "upon the right of the parties," but is affirming their finding of liability; determining that the damages *awarded thereon were inadequate as a matter of law and announcing the limit of the damages awardable as a matter of law* (emphasis added).

Although *O'Connor* was decided prior to the 1986 amendment, it is instructive about how New York courts view the appellate courts' powers to review damage awards. *See also, Ladd v. Parkhurst*, 87 A.D.2d 971, 150 N.Y.S.2d 92 (4th Dept., 1982) (The Appellate Division stated "[i]n reviewing a jury verdict on damages an appellate court, like a trial court, may, if it determines such verdict to be inadequate *as a matter of law*, properly place a value on plaintiff's injuries equal to the maximum

amount a jury would be warranted in awarding and afford the defendant the opportunity to pay the increased amount rather than be subjected to a new trial" (emphasis added)).

The City is not suggesting that a federal court sitting in diversity should apply section 5501(c) in its entirety, including the power of the Appellate Division to make new findings of facts. The substantive legal standard of "deviates materially," however, is not dependent upon the court's powers to review facts and can be applied as a matter of law.[4]

As set forth above, the "deviates materially" standard is a substantive legal standard. The State has made a policy determination that a party should not be permitted to recover any amount beyond that standard for a state-created tort. In diversity cases where the substantive right to be enforced is created by state law, the federal court must respect the state's decision regarding the limits of recovery imposed for violations of those rights. *See*, *Felder v. Casey*, 487 U.S. 131, 133 (1988) ("federal courts are constitutionally obligated to apply state laws to state claims").

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[4] While the "deviates materially" standard is arguably less deferential to juries than the "shocks the conscience" standard, it does not violate the Seventh Amendment because, as discussed above, the Court, in applying this standard, will not be making new findings of facts.

Contrary to petitioner's suggestion (Pet. Br., p. 18), it would not be absurd for a federal court to apply the excessiveness review standard of section 5501 without also incorporating the additur provision of CPLR § 5501(c). The plaintiff chooses the forum in diversity cases and thus, should not be heard to complain that he is disadvantaged by this selective application of CPLR § 5501(c).

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court reasoned that the determination whether state or federal law should apply must be made with reference to the policies underlying *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) -- the avoidance of inequitable administration of the laws and the discouragement of forum shopping. These policies support the application of section 5501(c) in diversity cases.

If only cases brought in state court were subject to appellate review under CPLR § 5501(c), "the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away" may "lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). For example, in *Nowlin v. City of New York*, 182 A.D.2d 376, 582 N.Y.S.2d 669 (1st Dept., 1992), *aff'd*, 81 N.Y.2d 81, 612 N.E.2d 285, 595 N.Y.S.2d 927, *rearg. den.*, 81 N.Y.2d 1068, 619 N.E.2d 661, 601 N.Y.S.2d 586 (1993), the plaintiff, a non-resident of New York State, was injured in a vehicular accident. She sued the City of New York as well as the driver of the car in which she was a passenger. The driver was a resident of New Jersey. The plaintiff elected to commence her action in New York State court, rather than invoking diversity jurisdiction in federal court. Plaintiff prevailed on her claim, but the New York State trial court and Appellate Division significantly reduced the personal injury award as excessive.

If the *Nowlin* plaintiff, however, had commenced a diversity action in federal court, and section 5501(c) were not applicable, she might have recovered more than the amount considered reasonable by New York. The permissible recovery for a state-created tort should not be

dependent upon whether the case is brought in state or federal court. Otherwise, the important purposes underlying the enactment of the New York excessiveness standard -- "to assure greater scrutiny of the amounts of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the state" -- would be greatly undermined. *See*, Governor Cuomo's Approval Memorandum of L. 1986, ch. 682, 1986 McKinney's Sess. Laws of N.Y., pp. 3182, 3184.

The prospect that recovery for a state-created tort could turn on the forum chosen by a plaintiff invites variability of jury awards for similar injuries within the state. Such a result "undermines the legal system's claim that like cases will be treated alike . . . [It also] makes it harder to settle cases, thus adding unnecessary transaction costs to the tort system." Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995).

Additionally, if the application of section 5501(c) turned on whether a plaintiff has chosen to commence suit in state or federal court, forum shopping may be encouraged. Some commentators have noted that "'[t]he only groups who still argue strongly for diversity jurisdiction are the Association of Trial Lawyers of America, whose members specialize in personal injury litigation, and corporate lawyers whose clients prefer the federal courts." C. Wright, Law of Federal Courts, § 23, p. 152, footnote 54 (5th ed. 1994) (quoting Sheran & Issacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1 (1978)). In choosing the forum, a plaintiff clearly will, as he or she has a right to, consider

the tactical advantages of each forum. The permissible amount of recovery, however, is unlike rules of discovery and other court practices. It would be unfair to expose a defendant to liability beyond the limits set by the state simply because there is a diversity of citizenship.

In sum, New York has determined that recovery in tort should be barred for any amount which "deviates materially from what would be reasonable compensation". CPLR § 5501(c). This is a matter of substantive state law and represents the codification of important state policies. Thus, the Second Circuit properly determined that CPLR § 5501(c) should be applied in determining whether the jury award in this case was excessive.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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